

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

3 MICROSOFT CORPORATION,)
4)
5 Plaintiff,) C10-1823-JLR
6 v.)
7) August 26, 2013
8 MOTOROLA, INC., et al,)
9) TRIAL
10 Defendant.)
11)

12 BEFORE THE HONORABLE JAMES L. ROBERT
13 UNITED STATES DISTRICT JUDGE

14 APPEARANCES:

15 For the Plaintiff: Arthur Harrigan, Christopher
16 Wion, David Pritikin, Richard
17 Cederoth, Andy Culbert, Nathaniel
18 Love and Ellen Robbins

19 For the Defendants: Ralph Palumbo, William Price,
20 Brian Cannon, Kathleen Sullivan,
21 Andrea Roberts and Phillip McCune
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1 THE COURT: Case C10-1823, Microsoft Corporation
2 versus Motorola Mobility. Counsel, please make your
3 appearances for the record.

4 MR. HARRIGAN: Good morning, your Honor. Art
5 Harrigan representing Microsoft; and to my right, Ellen
6 Robbins from the Sidley firm.

7 MS. ROBBINS: Good morning, your Honor.

8 MR. HARRIGAN: Mr. Pritikin, whom you have met
9 before, from the Sidley firm.

10 MR. PRITIKIN: Good morning, your Honor.

11 MR. HARRIGAN: Mr. Cederoth.

12 MR. CEDEROTH: Good morning.

13 MR. HARRIGAN: And Mr. Culbert from Microsoft.

14 MR. CULBERT: Good morning, your Honor.

15 MR. PALUMBO: Good morning, your Honor. Ralph
16 Palumbo, representing Motorola. With me at counsel table
17 from Quinn Emanuel, Andrea Roberts, who you have met before;
18 Brian Cannon, Kathleen Sullivan --

19 MS. SULLIVAN: Good morning, your Honor.

20 MR. PALUMBO: This is Kirk Dailey, who you have seen
21 on the witness stand before, from Motorola. And Bill Price.

22 MR. PRICE: Good morning, your Honor.

23 THE COURT: Counsel, we have the jury pool
24 downstairs. The only two matters that I have to take up I
25 think we can do fairly briefly. One is for you to take your

1 exceptions as to the changes in the preliminary jury
2 instructions.

3 And the other one is in preparing my questions for the
4 jurors, I need you to know that because it is going to come
5 out in the final instructions, I intend to ask if they own
6 shares of stock in Google. And if anyone has an objection to
7 that, we should talk about it before we do that. There is no
8 way, it seems to me, that we cannot ask, since Google is
9 Motorola's parent company and there would be a financial
10 link. It is in the final instructions. Mr. Price, I want to
11 make sure you are aware I am going to do that.

12 MR. PRICE: No objection, your Honor.

13 THE COURT: The other matter I want to point out to
14 you is, I mentioned earlier we do a return of service to
15 potential jurors. One of the jurors, Juror 22, has
16 indicated, and I will simply quote this, "My English of
17 understand is not so well. Some works to be hard to
18 understand." That could be intended to be "words." "My read
19 isn't so well." That may be something that she will raise
20 voluntarily, but if not, make sure that you are aware of
21 that, and raise it for the court's attention if we don't deal
22 with it.

23 The other is one of the jurors indicated that he has a
24 hearing issue, but as long as the courtroom is amplified,
25 that shouldn't be a problem. And this courtroom is

1 amplified, and we also have available some hearing assisting
2 devices. But if that doesn't come up -- That would be Juror
3 Number 7. Those are two physical limitations that you should
4 be aware of.

5 Mr. Harrigan, does Microsoft have any additional
6 exceptions to the instructions after the revisions done by
7 the court?

8 MR. HARRIGAN: Your Honor, the only one is
9 essentially the one that we raised earlier; and that is that
10 we believe in its current form the instruction may suggest
11 that the only breach issue in the case is the duty of good
12 faith and fair dealing, as opposed to a breach of RAND
13 commitment. I think we have raised specifically where that
14 was earlier.

15 THE COURT: I believe you are talking about the
16 bottom of Page 5, where the court says, "Microsoft claims
17 that Motorola breached the contracts while violating the
18 covenant of good faith and fair dealing that is implied in
19 those contracts." I considered your exception. And since
20 the next line reads, "One of the alleged breaches is by
21 offering the term contained in the two letters," I felt that
22 appropriately addressed it. To change it in the manner you
23 suggested would simply be duplicative. That's why the court
24 did that.

25 MR. HARRIGAN: Understood, your Honor.

1 THE COURT: Ms. Sullivan.

2 MS. SULLIVAN: Good morning, your Honor. Just two.
3 We just repeat for the record our objection to the statements
4 of the findings of fact and conclusions of law, RAND rate and
5 range inclusion in the instructions. We previously expressed
6 our objections in Dockets 797, 791, 857, 864 and 869.

7 And, your Honor, the second one is simply that we object
8 to your Honor not including our suggestion of the statement
9 that under Motorola's contracts with the IEEE and ITU,
10 Motorola did not need to make an initial offer on RAND terms.

11 THE COURT: And I looked at that one. That is
12 another one I think is in the final instructions. And it
13 seems to me I wanted to make clear that -- what I contemplate
14 as the procedure in this, if you have one of those that
15 you're not sure that it is a conclusion of law, and instead
16 it is a finding of fact, raise the issue with me and I will
17 give you clarification if it is all right for you to inquire
18 of witnesses about that kind of question.

19 MS. SULLIVAN: Thank you, your Honor.

20 THE COURT: Counsel, other than those points?
21 Mr. Harrigan, anything that you want to raise with the court
22 on behalf of Microsoft?

23 MR. HARRIGAN: Your Honor, I'm not sure what the
24 court's timing is, but I think both parties have some issues
25 with proposed slides being used in the opening statements.

1 THE COURT: Let's take them up now.

2 MR. HARRIGAN: Who would you like to have go first?

3 THE COURT: Well, you are the plaintiff, so why don't
4 you go ahead?

5 MR. HARRIGAN: There are two areas, your Honor. I
6 will address one, and Ms. Robbins will address the other one.
7 The one I want to talk about is Motorola's use of
8 Exhibit 7242, which is a September 24, 2009 negotiation. It
9 is an exhibit relating to a negotiation with HTC that
10 included 802.11 patent licenses.

11 THE COURT: Because of your decision to computerize
12 all of these things, I don't have a hard copy of these. So
13 if you are going to make reference to them, you need to put
14 it up on the screen.

15 MR. HARRIGAN: There are two different exhibits
16 involved here, one of Motorola's and one of ours. So we will
17 hand them both up. The last page of Exhibit 7242 is probably
18 the best place to look. I think it is Page 11. It is
19 entitled "H.264's exposure." About three points down it
20 says, "Motorola's 2.25 percent standard rate applies to
21 sales." We are not sure exactly what the purpose -- what
22 will be made of this exhibit, but it obviously should not be
23 used to argue with the court's determination that RAND was
24 not 2.25 percent. And if it is being offered to show that
25 Motorola said its standard rate was 2.25 percent -- If this

1 was something relevant to RAND, it should have come in in the
2 earlier case. And, secondly, it gets us into a hodgepodge of
3 issues of how do you separate out the 802.11 value from
4 everything else. Under the final bullet point, at the end,
5 it says, "No royalty stacking," which means if HTC has -- if
6 Motorola has other patents that are in HTC's portfolio, they
7 get them for nothing. We can't tell whether that refers to
8 only standards-essential patents or any patents. But either
9 way, you can't separate out the 802.11 within the
10 2.25 percent.

11 The other point related to this exhibit is that later on
12 in the process the same 2.25 percent was applied by Motorola
13 to -- in further negotiations with HTC to a whole bunch of
14 other patents besides -- patent portfolios besides 802.11.
15 February 2 -- This is our exhibit, 3162, which the court
16 has. And on the last page of that exhibit you will see that
17 there they are still talking about 2.25 percent on the net
18 selling price, but the patents that are covered are GSM CDMA
19 3G Wimax and some nonessential patents. So we believe this
20 entire -- whatever use is going to be made out of these
21 exhibits, it is either rearguing the court's rate or it is
22 getting us into an area for which there has been, as far as I
23 know, no expert report and no basis on which the jury could
24 figure out what the 2.25 percent applies to.

25 THE COURT: All right. Ms. Sullivan, you or

1 Mr. Price. Mr. Price, by the look of it.

2 MR. PRICE: Your Honor, I will address this one,
3 because Mr. Dailey -- I will be examining him.

4 THE COURT: Specifically what I want to know is what
5 is the purpose for this. I understand the other part of that
6 argument.

7 MR. PRICE: The purpose of this is Mr. Dailey is
8 going to testify that Motorola's practice was to start its
9 negotiations at 2.25 percent.

10 THE COURT: Stop there, because you are going to win.
11 Is Mr. Dailey also going to be able to answer
12 cross-examination in regards to the scope of these?

13 MR. PRICE: Yes.

14 THE COURT: Then I'm going to overrule the objection.
15 Anything else, Mr. Harrigan? Ms. Robbins?

16 MS. ROBBINS: Good morning, your Honor. Two quick
17 issues. The first is with respect to opening statements. We
18 learned last evening that Motorola intends to play some
19 deposition designation video clips during their opening. As
20 you may recall, during the call last Thursday with the court,
21 the parties had agreed the only deposition designations that
22 would be played in the openings were those that had been
23 designated, disclosed and the objections ruled upon by the
24 court. That was a call with the clerk and Mr. Cramer and
25 Mr. McCune. We learn that now Motorola now wants to play

1 deposition excerpts from Bodewig, Microsoft's expert on
2 German law, and two Microsoft fact witnesses who will be
3 testifying live, Jeff Davidson and Horacio Gutierrez. None
4 of these were disclosed and ruled on by the court. No
5 Bodewig testimony was ever designated. The designations of
6 Mr. Davidson and Mr. Gutierrez were withdrawn because they
7 will be testifying live. So there were never any rulings on
8 Microsoft's objections. Indeed, some of the portions of
9 Mr. Gutierrez's deposition testimony Motorola intends to play
10 in opening were never designated. So we think these
11 designations will never be evidence in the case, and we think
12 that use in the opening statement would be improper.

13 THE COURT: All right.

14 MR. PRICE: Good morning, your Honor. The deposition
15 selections that we wish to show in opening statement preview
16 the testimony that we believe will be elicited at trial.
17 They are three separate categories: The deposition testimony
18 that we submitted to your Honor that Microsoft did not make
19 any objection to. And then also deposition testimony that we
20 submitted to your Honor and there were objections. And then
21 deposition testimony that we did not submit to your Honor,
22 particularly from Microsoft's expert. And if you recall the
23 pretrial conference a couple of weeks ago, there was a
24 discussion about what witnesses would be live, whether there
25 would need to be a trial subpoena. And your Honor indicated

1 that the court was reviewing the deposition transcripts. In
2 conversations between counsel that evening, in order to
3 alleviate the burden on the court, we withdrew the formal
4 designations so that your Honor would not have to rule on the
5 objections because Microsoft represented that several of the
6 witnesses would be called live. And so we wish to show short
7 clips in the opening that would preview the testimony that we
8 believe will be elicited either live or through deposition
9 testimony.

10 THE COURT: You can play anything that I have ruled
11 on and will be shown to the jury during the trial. Other
12 than that, no. I haven't read all of those, because you
13 withdrew them. And, therefore, I am not comfortable with at
14 least your second category, which seems to be ones where you
15 have designated. I know that the ones you haven't designated
16 aren't coming in. So what may be shown will be excerpts that
17 will ultimately be shown to the jury.

18 MR. PRICE: Would that include also, your Honor,
19 excerpts that we submitted that Microsoft had no objection
20 to?

21 THE COURT: I don't know what those are. You say you
22 submitted. Are you calling them as a witness?

23 MR. PRICE: Yes.

24 THE COURT: You are calling them live?

25 MR. PRICE: It is Microsoft's witness, Mr. Davidson,

1 that we will be calling live. He will presumably be here
2 live. We are not absolutely sure because it is a Microsoft
3 witness.

4 THE COURT: My rule on opening statements is that
5 they are intended to discuss the evidence the jury will hear
6 at trial, not the evidence the jury won't hear at trial.
7 And, therefore, I am comfortable having you play excerpts
8 which are going to be played during the trial. I am not
9 comfortable with the concept of a preview, since that
10 conceivably will be a preview of something they ultimately
11 don't hear. Is that clear?

12 MR. PRICE: It is, your Honor.

13 THE COURT: Anything else? You're done, aren't you?

14 MS. ROBBINS: One more exhibit objection.

15 THE COURT: All right, counsel.

16 MS. ROBBINS: 7241. I will hand up a copy.

17 THE COURT: Is this going to be the last one?

18 MS. ROBBINS: Yes.

19 MR. PRICE: Not for us. We have some, too.

20 THE COURT: All right. Apparently we are doing these
21 one at a time.

22 MS. ROBBINS: Your Honor, this will be brief. This
23 exhibit we didn't have an objection to until last evening
24 when Motorola advised -- there is a cover e-mail, as you will
25 see, and then there is a copy of the complaint in this

1 action. Motorola advised us last night that they want to
2 withdraw the complaint portion and just introduce the cover
3 e-mail. Our objection is that this is -- that would be an
4 incomplete exhibit and in violation of Federal Rule of
5 Evidence 106; that they need to introduce -- if they are
6 going to use the e-mail, they need to use the attachment that
7 is referenced in the e-mail. It is meaningless without the
8 attachment.

9 THE COURT: You've lost me, counsel. Are you telling
10 me that 7241 is going to be offered by Motorola, but only the
11 cover page?

12 MS. ROBBINS: Yes. We think that is improper.

13 MR. PRICE: Your Honor, if you look at the exhibit,
14 what is attached is the complaint that was filed by
15 Microsoft. It is actually in this case. We believe it would
16 be prejudicial to include the complaint, because the jurors
17 might consider it for the truth. They will be told what is
18 attached to this is the complaint that was filed. The point
19 being, just that there was communication between Microsoft
20 and Motorola on the same day the complaint was filed. That
21 communication is relevant as to what Microsoft's state of
22 mind was.

23 THE COURT: Mr. Price, I suspect the purpose of this
24 is to be able to rub Mr. Smith's nose in the fact that he
25 said, "the work of your very good litigation team," since

1 that is how it was originally presented to the court. I will
2 require use of the entire document.

3 MR. CANNON: Your Honor, we have three categories of
4 objections to the opening slides that Microsoft proposes to
5 provide. If I may approach?

6 THE COURT: Yes.

7 MR. CANNON: The first objection we have is to the
8 very first slide here, which references a litigation between
9 Nvidia and a number of other companies. And this is
10 completely separate litigation. This pleading is being
11 provided, apparently as evidence, even though the Ninth
12 Circuit pleadings are not evidence. I think, more
13 importantly, this proposed exhibit and proposed slide injects
14 an entirely different litigation into this case. The
15 connection between this litigation and this other case
16 between Nvidia and Motorola Solutions we believe really ought
17 not to be the subject of this trial. We would have to
18 explain --

19 THE COURT: Stop for a second, Mr. Cannon. What is
20 this? Are these findings and conclusions?

21 MR. CANNON: No, this is --

22 THE COURT: Paragraphs out of the complaint.

23 MR. CANNON: It is out of the complaint. It is in
24 fact a RICO complaint brought by a number of people against
25 Nvidia, who were sending letters to users of WiFi, like

1 restaurants and cafes and places like that.

2 THE COURT: My concerns are simply the document
3 doesn't explain what it is. That's why I need to know.

4 MR. CANNON: It is a pleading from another case. It
5 is a complaint in which several companies, including Cisco,
6 Motorola Solutions and others, brought these allegations
7 against Nvidia. In order to explain it, we would have to get
8 into the details of this other pleadings, which we think is a
9 bit of a sideshow on this case. You can see from the slide
10 that Microsoft proposes they have highlighted the language
11 about RAND being violated by blatantly unreasonable offers.
12 We think that, to some degree, invades the province of the
13 court, because the issue of what -- you know, the duty of
14 good faith and fair dealing has been hotly contested, and
15 your Honor will provide an instruction on at the end of this
16 case. This is sort of an attempt by Microsoft to inject a
17 pleading that alleged -- made allegations in another case
18 into this case.

19 THE COURT: Why don't you run through all of your
20 objections and I will hear from the other side.

21 MR. CANNON: That is the first one.

22 THE COURT: You said there were three.

23 MR. CANNON: There are three. The second category,
24 your Honor --

25 THE COURT: By category you mean specific pages?

1 MR. CANNON: I can walk through. So if you can go to
2 Page 6, is the first example. This is, your Honor, what
3 purports to be selections from the findings of fact and
4 conclusion of law. And there are several of these, about
5 eight different slides, that, your Honor, we believe directly
6 violates your Honor's instruction in the conference from
7 Friday and the order yesterday that counsel are not supposed
8 to display portions of the findings of fact and conclusion of
9 law to the jury. And this is exactly what slide 6 is, slide
10 12, slide 26, and others. They are literally quotes,
11 although in some cases the quotes are paraphrased and cut off
12 selectively. And so we believe that violates the order.

13 THE COURT: What pages, again?

14 MR. CANNON: They are 6, 8, 10, 12, 13, 25, 26, and
15 then we've got an additional one, slide 1, from last night,
16 which I can hand up, which is in a separate packet. If you
17 will allow me to do that, your Honor?

18 So, your Honor, we thought the court was pretty clear that
19 the parties were not supposed to display portions of the FFCL
20 to the jury, and this violates that. Second of all, it is
21 not clear to us at all that competent witnesses are going to
22 be able to testify to the portions that Microsoft has
23 selected. We asked Microsoft last night who are the
24 competent witnesses that are going to testify to these facts,
25 and they wouldn't tell us. We don't believe there are going

1 to be competent witnesses for these facts, we don't think the
2 facts should be up for the jury. In addition, several of the
3 slides we think are really in there -- they are excessive and
4 violate Rule 403. And I can point you to those slides. I
5 will give you an example. Slide 26 talks about significant
6 stacking concerns.

7 THE COURT: All right. What's your third category?

8 MR. CANNON: The third category, slides 7 and 11 are
9 slides that describe the title of the -- slide 7 is, "At
10 least 92 companies own patents essential to 802.11." And
11 slide 11, the title is, "At least 52 companies own patents
12 essential to H.264." Your Honor, the FFCL, in paragraphs 335
13 and 152 make clear, and it is very accurate, that it is not
14 necessarily that these patents -- these companies own
15 essential patents, but letters of assurance have been
16 submitted by this number of companies. So there is a
17 difference between submitting a letter of assurance and in
18 fact having essential patents. Anyone can submit a letter of
19 assurance. We think it is inaccurate that 92 companies
20 submitted such letters to 802.11, and 52 companies submitted
21 letters to H.264. But the connection between that and saying
22 these companies in fact own essential patents, your Honor, is
23 very different.

24 And we proposed to Microsoft, hey, if you just change the
25 title to more accurately reflect paragraphs 152 and 335, we

1 would be okay with this slide. But Microsoft would not
2 change its title. It pointed us to other portions of the
3 findings of fact that it believes supports its
4 interpretation, that this title is okay. But we think
5 paragraphs 152 and 335 are clearly inaccurate, your Honor.

6 THE COURT: Mr. Harrigan.

7 MR. HARRIGAN: I will begin with the last one. The
8 courts -- With regard to the 92 and 52 companies owning
9 standards-essential patents, and the two standards, finding
10 number 456 says, quote, "There are at least 92 entities that
11 own 802.11 SEPs," and finding number 459 says, "There are at
12 least 52 entities that own H.264 SEPs." These are simply
13 stating exactly what the court found with respect to those
14 two.

15 With regard to the Nvidia, I guess it is, complaint,
16 Motorola Solutions was a party to this case. The reason for
17 introducing this is that it is a party admission, yet
18 basically admits that blatantly unreasonable offers are a
19 breach, and it also refers to making demands that are unfair
20 and unreasonable, meaning the breach applies to demands or
21 offers. It also alludes to injunctive relief as a part of
22 the breach. So we simply think that the allegation is an
23 admission by a party to this case with respect to those
24 matters, and is admissible for that reason.

25 Then, with regard to the findings, your Honor, what we

1 understand to be the current situation --

2 THE COURT: Let me ask you this about the findings.
3 Do you have a witness who is going to testify to the material
4 that is on 6, 8, 10, 12, 13, 25 and 26?

5 MR. HARRIGAN: No, your Honor. We think it is a
6 matter of judicial notice and public record. It is a public
7 filing.

8 Your Honor, I have to say we are in a state of uncertainty
9 with regard to the final instructions. We don't know whether
10 they are going to say the blatantly unreasonable offer is a
11 breach. We are looking for ways to establish that.

12 Your Honor, I'm not sure whether you and I are now talking
13 about the same topic, because I was about to discuss the
14 findings. I thought you were wanting to go back to the
15 Nvidia complaint, because I do have some further remarks to
16 make about the findings.

17 THE COURT: Let me rule then on the Nvidia complaint,
18 which is that I am not going to permit the use of Page 1.
19 That's not to say that when you have a witness on the stand
20 you can't ask them to confirm. I don't think that it is
21 fair -- If I can't figure out what this is, and I am
22 familiar with complaints and whatever, to simply slap this up
23 and say, this is Motorola, and it is another lawsuit. That
24 needs much more context than you are proposing to give.

25 MR. HARRIGAN: When I answered your question, no, I

1 was talking about the Nvidia complaint.

2 THE COURT: I am talking about Pages 6, 8, 10, 12,
3 13, 25, 26. I thought my ruling was that you needed to have
4 a witness, that you couldn't use the findings and conclusions
5 as some sort of judicial notice or -- that they are self
6 testifying.

7 MR. HARRIGAN: We will have a witness to testify to
8 each one of these statements as a matter of fact. And we
9 understood that that could be done, in effect, in reliance on
10 the findings. And what we are going to say to the jury is,
11 that these facts that are set forth on these documents will
12 not be disputed. And we will in fact have a witness on each
13 and every one.

14 THE COURT: All right. 1 is out for purposes of the
15 opening. The second category, 6, 8, 10, 12, 13, 25 and 26
16 are permitted to be used. 7 and 11, it sounds like there is
17 an inconsistency in my own findings and conclusions, but I am
18 going to permit the use of them. I don't think anyone will
19 know what the difference is.

20 MR. CANNON: Your Honor, may I raise one issue on the
21 findings of fact? We don't know who the competent witnesses
22 are going to be to testify as to those facts. We thought
23 your order was pretty clear, and appropriately so, that the
24 findings of fact should not be displayed. They are proposing
25 to do exactly that.

1 THE COURT: Those are the findings of fact, sir.
2 Many of them are paraphrases of things that I have found, and
3 it said that ultimately have been established for purposes of
4 this case.

5 Anything else, Mr. Harrigan?

6 MR. HARRIGAN: Are we clear on those? No, your
7 Honor, I think we are there.

8 THE COURT: Mr. Price, I think you asked for an hour
9 to look at jury questionnaires. We got pretty close to it.

10 Ladies and gentlemen, those of you in the audience, who
11 are on my right-hand side, you will have to become friendly
12 with the people on the left-hand side. We will need that
13 area for the jurors.

14 Casey, will you have the jury brought up?

15 (Prospective jury entered the courtroom.)

16 THE COURT: Ladies and gentlemen, welcome. You are
17 in the United States District Court for the Western District
18 of Washington. My name is Judge Jim Robart. In the next
19 couple of hours we are going to be picking the jury in a
20 civil case that is pending here.

21 The questions that I would ask if I were you is: Well,
22 why am I doing this? Why are they asking questions? What's
23 going on here? And the answer is that the parties have a
24 right to know a little bit about you, to find out if there is
25 some reason why you shouldn't be on the jury. They are also

1 going to try and figure out why you should be on the jury if
2 they think you are going to be helpful for them. But mostly
3 my job is to make sure that someone who has a reason why they
4 should not be on the jury will not be on the jury.

5 I am going to ask you some questions, and the way that we
6 respond to those will be for you to hold up your numbers, so
7 don't let those get too far away. You did a questionnaire,
8 which is a little bit unusual. I usually don't do jury
9 questionnaires, but this case, as you may have figured out
10 from the questions that were asked, involves Microsoft and it
11 involves Motorola. And because I have already conducted one
12 phase of this trial, and there was some newspaper publicity
13 about it, some of you may have heard or know something about
14 the case.

15 I can tell you that I have given each side a limited
16 period of time or a specific period of time in which they are
17 going to present their case. So I know that this case will
18 go to the jury next Wednesday. So we will be having trial on
19 Monday, Tuesday, Wednesday, Thursday, and Friday of this
20 week, Monday is a holiday, and then on Tuesday and Wednesday
21 of next week. And that's a hard deadline. They have a
22 period of time, and they need to get it done.

23 Having conducted a phase of the trial already, I can tell
24 you that it is very interesting. It has to do with patents
25 and licenses to use those patents.

1 We are going to ask you to be sworn, and then I'm going to
2 ask you some questions, you are going to raise your number,
3 and then I will go back and talk to those people that
4 answered affirmatively to any of those questions. There may
5 be times during that questioning that you don't want to
6 answer a question in front of everyone else. That doesn't
7 tend to happen real frequently in civil trials, it does
8 sometimes in criminal trials, people don't want to say that
9 one of their children was arrested for something. But there
10 may be a question that you want to. And we are going to add
11 to your lingo. All you have to do is say, I would like to
12 talk to you at sidebar, and that means the lawyers will come
13 up, the court reporter will step over, and we will talk
14 privately among ourselves. Other than that, you are all
15 going to get to discuss this in front of each other. There
16 is going to be one exception to that, and that's the question
17 when I ask you if you have heard anything about this case.
18 The reason that one is, is if you have heard something, I
19 don't want you to tell everyone else. Your decision is going
20 to be made based on what you hear on this courtroom.

21 Let me add one other fact before I have you sworn. I have
22 indicated previously that the plaintiff in this case is
23 Microsoft Corporation, the defendant in this case is Motorola
24 Mobility. You will hear me refer to them as Motorola.
25 Motorola has some patents that are commonly used in

1 electronics, particularly cellular telephones and game boxes
2 of one variety or another, game players. Those are
3 registered as a part of a standard that is developed. That
4 standard would then be used by a bunch of different companies
5 so that they will all have the same technology. Motorola,
6 through this convention you will hear about, agrees it will
7 license everybody on some terms called reasonable and
8 non-discriminatory, R-A-N-D, reasonable and
9 non-discriminatory terms. Motorola had that offer out to
10 Microsoft, and Microsoft feels that they breached -- Motorola
11 breached its agreement.

12 As I have indicated, at one point there was some publicity
13 about this previously.

14 Some of you I know have backgrounds, some of you I think
15 may even work for Microsoft, and so that's the kind of thing
16 that we would like to have come out so that people will know
17 who you are all dealing with. At this time I am going to ask
18 the clerk to swear you in, and then we will begin this
19 process.

20 (At this time the clerk swore in the prospective jury.)

21 THE COURT: Please be seated. Just to practice, how
22 many of you are still breathing? Will you please raise your
23 number? Everyone has a number.

24 Once you raise your number, if you will please keep it up
25 in the air until the clerk calls it. I write those numbers

1 down so I can go talk to you individually about a question.

2 I have indicated to you how long this trial is going to
3 take. Is there anyone who would have difficulty being here
4 for the period of time that the trial is going to take and
5 some period of deliberations? I can control how long the
6 trial is, you will control how long the deliberations are.
7 So I can't tell you that it is a hard end date to the case.

8 But length of the trial, anyone have a problem with that?
9 Please raise your numbers.

10 THE CLERK: 6, 4, 11, 18, 20, 22, 24, 25, 27, 37.

11 THE COURT: All right. The next one is, this part
12 you can all answer in public. If some of have you heard
13 about this case, then we will probably do that at sidebar.
14 But how many of you think you have heard about or read about
15 this case?

16 THE CLERK: 2, 4, 5, 15, 23.

17 THE COURT: I am now going to ask, and this will take
18 a little bit of time, I am going to ask each of the tables of
19 lawyers throughout here to stand up, introduce themselves,
20 introduce the people at their table, introduce their client,
21 so you will know which one is which, and then tell you who
22 are the potential witnesses in the trial.

23 Now, two things about potential witnesses: One, if they
24 don't name them, they won't get to call them. So they will
25 be overly inclusive. Secondly, it is one of Murphy's laws

1 that every time one of them will be named John Smith. And so
2 you may hear them say something like Professor John Smith, or
3 in some cases when I am doing criminal trial, Seattle police
4 officer John Smith. That is not intended to tell you
5 anything about that individual other than perhaps you know a
6 police officer named John Smith as opposed to anyone in the
7 world.

8 We are going to do that on both sides. We will start with
9 Microsoft, and then we will go to Motorola. They will
10 mention who they are, who their clients are, who their
11 witnesses are. And when all that is done, I will ask you if
12 you think you know anyone who is involved in this case.

13 Mr. Harrigan.

14 MR. HARRIGAN: Thank you, your Honor. Good morning,
15 everyone. My name is Art Harrigan. I am from a law firm
16 here in Seattle.

17 JUROR No. 7: I can't hear what you are saying.

18 THE COURT: Why don't you go to the podium?

19 Sir, thank you. Anyone who has trouble hearing, shout out
20 at them. This is the one chance to order attorneys around.

21 MR. HARRIGAN: My name is Art Harrigan. I am from a
22 Seattle law firm. My client in this case is Microsoft, which
23 is the plaintiff. I am here with other lawyers, both from my
24 firm and from a firm that is out of Chicago called the Sidley
25 Austin firm. My firm is called Calfo Harrigan Leyh & Eakes.

1 I will start right here with Ms. Robbins, who will be
2 presenting some of the evidence in this case.

3 MS. ROBBINS: Good morning.

4 MR. HARRIGAN: And Mr. David Pritikin.

5 MR. PRITIKIN: Good morning.

6 MR. HARRIGAN: And Rick Cederoth, who will be
7 presenting evidence.

8 MR. CEDEROTH: Good morning.

9 MR. HARRIGAN: And then to his left is Mr. Andrew
10 Culbert, who is a Microsoft in-house lawyer. He is going to
11 be here because he is very interested in the case, but he
12 will not be interrogating any witnesses or presenting any
13 evidence.

14 Also here is David Killough. David Killough is also a
15 Microsoft lawyer. He is actually going to be the Microsoft
16 corporate representative at this trial. And you will -- He
17 won't be presenting any evidence, except that he will be
18 sitting in the witness box and testifying at some point
19 during the case.

20 So, your Honor, are witnesses the next item?

21 THE COURT: Yes.

22 MR. HARRIGAN: I will give you the names of the
23 witnesses that Microsoft anticipates calling in this case,
24 and then I presume that Motorola will tell you about theirs.
25 I will just give you the names, and obviously let us know if

1 they ring a bell. Theo Bodewig. Todd Menenberg. Kevin
2 Murphy. Aaron Bernstein. Brian Blasius. Kirk Dailey. Jeff
3 Davidson. Theresa Dailey. Jon Devaan. Garrett Glanz.
4 Horacio Gutierrez. David Heiner. David Killough. Shelley
5 McKinley. Jennifer Ochs. Owen Roberts. David Treadwell.

6 THE COURT: Thank you, Mr. Harrigan. Mr. Price,
7 Ms. Sullivan, Mr. Palumbo.

8 MR. PALUMBO: Good morning, ladies and gentlemen. My
9 name is Ralph Palumbo. And like Mr. Harrigan, I am a lawyer
10 here in Seattle with the firm of Summit Law Group. I have
11 with me -- and if you will stand as we go through this,
12 Andrea Roberts from the Quinn Emanuel firm.

13 MS. ROBERTS: Good morning.

14 MR. PALUMBO: Brian Cannon.

15 MR. CANNON: Good morning.

16 MR. PALUMBO: David Weinberg, who is a consultant for
17 us. Kathleen Sullivan.

18 MS. SULLIVAN: Good morning.

19 MR. PALUMBO: Kirk Dailey. Mr. Dailey is the head of
20 licensing for Motorola. He is our corporate representative
21 at trial. And William Price, Bill Price.

22 MR. PRICE: Good morning.

23 MR. HARRIGAN: The witnesses that Motorola will call,
24 and I'm going to try not to repeat some of the names that
25 Mr. Harrigan gave to you, because there will be some overlap

1 in the cases. Maximilian Haedicke. Richard Holleman.
2 Bradley Keller. Gregory Leonard. Brian Blasius. Jeff
3 Davidson. Jon Devaan. I believe Mr. Harrigan mentioned
4 Mr. Dailey. Mr. Gutierrez, who Mr. Harrigan mentioned. Tim
5 Kowalski. Bob Love. Amy Marasco. Gary Sullivan. Neill
6 Taylor. David Treadwell. David Turner.

7 THE COURT: All right. Ladies and gentlemen, there
8 were a lot of names. The question I am going to ask you now
9 is: Are you personally acquainted with any of those
10 individuals? Are you related to any of those individuals?
11 Have you ever had business dealings with any of those
12 individuals? Are you currently or formerly employed by any
13 of those? Do you have any business connection with them?
14 Are you a vendor to them, for example. Are you a shareholder
15 in them? And I will tell you that Microsoft is a
16 publicly-traded corporation. Motorola is a wholly-owned
17 subsidiary of Google, so for purposes of being a shareholder,
18 I will ask you do you own shares in Google. So those are the
19 questions I am asking. Is there anyone who would respond
20 yes? Please raise your number.

21 THE CLERK: 1, 4, 5, 7, 8, 9, 11, 29, 35, 38.

22 THE COURT: All right. One of the questions that you
23 were asked on your questionnaire was about prior jury
24 service. That would include both state court, serving as a
25 juror, and previously here in federal court, or if you were

1 ever a grand juror. And if you were a grand juror, you know
2 what that is. And if you don't, sometime when we are on a
3 break I will tell you all about the grand jury system. The
4 reason that we ask that is that I then am going to ask you
5 how long ago that was, what kind of case it was, just to get
6 a sense of was it such a searing experience for you you don't
7 think you would ever want to do it again, and therefore it
8 might impact you being a juror here.

9 So for those of you who have previously served on a jury,
10 would you please raise your numbers?

11 THE CLERK: 2, 4, 7, 21, 29, 30, 35 and 38.

12 THE COURT: All right. And then I am going to ask
13 you my last question. And know that when I finish doing all
14 of these, including the follow-up, I am going to give the
15 parties a chance to ask you some questions.

16 Is there anyone who has a disability or some kind of a
17 special problem; I jokingly like to say, I know my
18 grandmother is going to die on Thursday, we have
19 nonrefundable airline tickets to go on our honeymoon, that
20 sort of thing, that would prevent you from being here for the
21 entire trial? Anyone that has a disability or problem that
22 would prevent them from serving as a juror?

23 All right. We will go back and start at the beginning
24 then. Juror Number 6, you indicated that you had a problem
25 with the length of service?

1 JUROR NO. 6: Yes.

2 THE COURT: Would you tell us about that, sir?

3 JUROR NO. 6: I am a commissioned salesperson, and
4 any minute that I am out of the store I am not making money.
5 I work for Sleep Country.

6 THE COURT: Does Sleep Country compensate you for
7 jury service?

8 JUROR NO. 6: A little bit. Very little.

9 THE COURT: Number 4. Tell us about your problem.

10 JUROR NO. 4: I had a vacation planned, leaving on
11 September 9th.

12 THE COURT: You are probably going to be done by
13 then. We won't worry about that. Where are you going to go?

14 JUROR NO. 4: California.

15 THE COURT: Nice place. Number 11.

16 JUROR NO. 11: We are moving our house on Wednesday,
17 that is the 28th. And then my last day at Microsoft is on
18 4th of September, so I need to be there.

19 THE COURT: You are employed by Microsoft?

20 JUROR NO. 4: Yes.

21 THE COURT: Number 18.

22 JUROR NO. 18: I am an hourly employee, so being out
23 of the office for that long is kind of a hardship.

24 THE COURT: And where do you work, ma'am?

25 JUROR NO. 18: CRG Events.

1 THE COURT: Number 20.

2 JUROR NO. 20: I have a project deadline coming up
3 this Friday. Working on the jury service would make it tough
4 to meet that deadline. Also, I have a vacation scheduled,
5 starting next Wednesday.

6 THE COURT: What kind of employment do you have, sir?

7 JUROR NO. 20: I am a civil engineer.

8 THE COURT: Anyone else in the office who could work
9 on your project?

10 JUROR NO. 20: There are other people working on the
11 project, but I have been tasked to certain things that only,
12 I guess, I am assigned to.

13 THE COURT: Number 22. You're probably going to have
14 to stand up, ma'am.

15 JUROR NO. 22: I am a mental health counselor, and I
16 have clients that are bilingual, that speak another language,
17 and I have a few that are really high risk, so that's why I
18 cannot serve.

19 THE COURT: All right. Thank you. 24.

20 JUROR NO. 24: I work as a medication safety officer
21 at the University of Washington Medical Center. It is okay
22 for me to be away for a few days. But for longer, there is
23 technically no one to cover my role.

24 THE COURT: I've found your employer to be very
25 reasonable about moving things around, particularly when they

1 know how important this is going to be.

2 Number 25.

3 JUROR NO. 25: I have a vacation scheduled for next
4 Monday.

5 THE COURT: Monday is a holiday for us, too.

6 JUROR NO. 25: It is the week following Labor Day.

7 THE COURT: An entire week?

8 JUROR NO. 25: Yes.

9 THE COURT: 27.

10 JUROR NO. 27: My daughter goes back to school
11 Thursday, and I get off at 2:30, and I am the only one that
12 can pick her up.

13 THE COURT: Tell me a little bit about that. Is
14 there absolutely positively no one else?

15 JUROR NO. 27: There is no one else to pick her up
16 from day-care.

17 THE COURT: Thank you, sir. 37. Number 37.

18 JUROR NO. 37: I am a massage therapist. And I am
19 the only one working in the chiropractic office in Issaquah,
20 plus my own business. If I'm not working, I don't get paid.

21 THE COURT: Thank you. The next question had to do
22 with what you have heard about this case. I will ask you to
23 stand up and just tell me if you have read about it in the
24 paper. I don't want you to tell me what you've heard. If I
25 think it is a problem, then I will have you do that

1 individually.

2 Juror Number 2, tell me, what did you hear or who did you
3 hear it from?

4 JUROR NO. 2: I remember vaguely reading about it
5 last year sometime. I don't remember any specifics about the
6 case.

7 THE COURT: Did you form any opinions about it at the
8 time?

9 JUROR NO. 2: It sounded really complicated.

10 THE COURT: I can attest to that. Anything other
11 than that?

12 JUROR NO. 2: No.

13 THE COURT: Number 4, can you tell us about it,
14 ma'am?

15 JUROR NO. 4: I read about it in the newspaper. I
16 usually read things that have Microsoft in the headline
17 because I own stock. As she said, it is complicated.

18 THE COURT: Did you form any opinions about which
19 side was right, which side was wrong, how well informed the
20 judge was?

21 JUROR NO. 4: That is a trap. No, I just sort of
22 follow Microsoft for obvious reasons.

23 THE COURT: Number 5.

24 JUROR NO. 5: I do work for Microsoft, so I have
25 heard about it in that context.

1 THE COURT: What kind of work do you do for them?

2 JUROR NO. 5: I am a software engineer.

3 THE COURT: Are you an independent or employee?

4 JUROR NO. 5: Employee.

5 THE COURT: Number 15.

6 JUROR NO. 15: I just read about it in the paper, and
7 this morning there was announcement of it, things like that.
8 I read the Seattle Times daily, but I don't necessarily
9 follow details.

10 THE COURT: Those pesky newspapers. Ladies and
11 gentlemen, for those of you who are going to end up on the
12 jury, please don't read anything more, don't listen to the
13 radio, don't listen to the television, and whatever you do,
14 don't go home tonight and type in on the internet
15 Microsoft/Motorola to see what you missed. Everything you
16 need to know about this case you will find out here in this
17 courtroom. You will hear me say that about every three hours
18 during the course of this trial. For those of you who are
19 not selected on the jury, you are free to stick around, free
20 to follow in the newspaper, or free to ignore us. For those
21 of you who are in jury service, that is a very important rule
22 for us.

23 Number 23.

24 JUROR NO. 23: I also read a little bit several
25 months ago in the paper. And I think Juror Number 2 put her

1 finger on it.

2 THE COURT: You didn't think the judge rendered --

3 JUROR NO. 23: The judge was extremely impressive.

4 THE COURT: Anything in that connection that would
5 cause you to start this trial feeling one way or another, who
6 was right, who was wrong?

7 JUROR NO. 23: No, sir.

8 THE COURT: The next one was about a whole lot of
9 you, and that was do you know anyone. Juror Number 1.

10 JUROR NO. 1: I am a shareholder of Microsoft, an
11 employee of Microsoft.

12 THE COURT: Let's start with being either of those.
13 You are being asked to give Motorola a fair trial. Your
14 company is suing them. Are we starting with a level playing
15 field, or do you go: wherever they came from they can go back
16 there? Maybe they came from Redmond, for all I know.

17 JUROR NO. 1: If I was selected I would do my best to
18 give an impartial judgment. But I don't know -- It would be
19 colored by my employer.

20 THE COURT: Sir, your honesty is tremendously
21 appreciated. Number 4. You're a shareholder?

22 JUROR NO. 4: Yes, and I have been for a long, long
23 time. Obviously I am interested in how Microsoft does.

24 THE COURT: Okay. And now I'm asking you to set all
25 of that aside, look me square in the eye and say: I can be

1 fair and impartial. The fact that I'm going to be
2 financially hurt if this case doesn't go well, or I am going
3 to be benefited if it goes well, or maybe none of the above,
4 or that I have lived in Seattle my entire life and I watched
5 Microsoft grow, and I love them as a company, but I'm going
6 to be fair. Is that how you really feel?

7 JUROR NO. 4: How close are you to retirement?

8 THE COURT: Enjoy that vacation you had planned.
9 Thank you, ma'am. Number 5.

10 JUROR NO. 5: I do work for Microsoft. I own the
11 stock. I believe I worked with a person, David Treadwell,
12 ten years ago, if that's the person I am thinking.

13 THE COURT: When Mr. Treadwell testifies, are you
14 going to go: Hi, Dave, how are you?

15 JUROR NO. 5: I don't think so.

16 THE COURT: The same general question, and counsel
17 will likely follow up if you are still in contention here:
18 Can you be fair to Motorola? Can you be fair to Microsoft?

19 JUROR NO. 5: It is our duty to be fair, and I will
20 do my best.

21 THE COURT: You have to take it one step beyond, "I
22 will try." You need to look me here square in the eye and
23 say: I know that I can do this; I am not going to favor one
24 way or the other.

25 JUROR NO. 5: I think I can do this.

1 THE COURT: All right. Number 7.

2 JUROR NO. 7: I own stock in both companies.

3 THE COURT: That is evenhanded.

4 JUROR NO. 7: I will win either way.

5 THE COURT: Let me ask you the same question. You
6 have a financial interest in both sides?

7 JUROR NO. 7: Yes, sir.

8 THE COURT: Maybe one is larger than the other, we
9 aren't going to go there. How do you feel about serving as a
10 jury member?

11 JUROR NO. 7: It is not a problem.

12 THE COURT: Do you think you can be fair and
13 impartial?

14 JUROR NO. 7: Extremely.

15 THE COURT: Number 8. There you are.

16 JUROR NO. 8: I just know one name that came up, and
17 that was from childhood. A friend of my father's named Bob
18 Love. I have a feeling it can't be the same person. Well,
19 no, that is not right to say. He would probably be about 75
20 or 80. I don't know if anyone knows the age.

21 THE COURT: Who is calling Mr. Love?

22 MR. PALUMBO: He is not 75 or 80, your Honor.

23 THE COURT: You're safe.

24 MR. HARRIGAN: Your Honor, I have been informed I
25 left out one witness, Dave Curtis. I would just like to get

1 that out as early as possible.

2 THE COURT: All right. Please add to that
3 collection, Dave Curtis. Mr. Harrigan, where does Mr. Curtis
4 reside?

5 MR. HARRIGAN: He is a Motorola employee.

6 THE COURT: We know that if it is Dave Curtis he is a
7 Motorola employee.

8 MR. PRICE: He is in Chicago, your Honor.

9 THE COURT: Number 9. There you are, sir.

10 JUROR NO. 9: I also have stock in both companies,
11 and know people that work for both companies. But I feel
12 like I can be impartial.

13 THE COURT: Do you start this process with favoring
14 either one or you're rooting for both?

15 JUROR NO. 9: Right down the middle.

16 THE COURT: Number 11.

17 JUROR NO. 11: I work in David Treadwell's
18 (inaudible). I would probably be partial to Microsoft.

19 THE COURT: All right. Thank you, ma'am. Number 29.
20 Yes, sir.

21 JUROR NO. 29: I just own stock in Microsoft.

22 THE COURT: For a long time, sir?

23 JUROR NO. 29: Yes.

24 THE COURT: I am going to ask you to be a fair and
25 impartial juror in something you have a financial interest

1 in. That is a pretty high task. How do you feel about doing
2 that?

3 JUROR NO. 29: I think I can be fair.

4 THE COURT: Have you ever faced that kind of
5 situation before?

6 JUROR NO. 29: Sure.

7 THE COURT: Were you fair then?

8 JUROR NO. 29: Yes.

9 THE COURT: Thank you, sir. Number 35.

10 JUROR NO. 35: I know witness Shelley McKinley.
11 Shelley and I worked at the same law firm many years ago for
12 a brief stint. Microsoft is also a client of our law firm.

13 THE COURT: All right. Have you stayed in touch with
14 the person?

15 JUROR NO. 35: No.

16 THE COURT: How are you going to feel about being a
17 fair and impartial juror for Motorola here when you know all
18 of those people at Microsoft?

19 JUROR NO. 35: Once an advocate, always an advocate.
20 However, I do think I can be fair.

21 THE COURT: All right. Thank you. Number 38.

22 JUROR NO. 38: I have been a Microsoft shareholder
23 for a long time, and my husband is a retired software
24 engineer from Microsoft.

25 THE COURT: So you know all the answers. Do you ever

1 discuss software with him?

2 JUROR NO. 38: No, I don't speak the language.

3 THE COURT: If you are a shareholder and your husband
4 is retired from there, you have kind of a financial interest
5 in -- you have a financial interest in how Microsoft does. I
6 am asking you to set that aside for purposes of this trial.
7 How do you feel about being able to do that?

8 JUROR NO. 38: I do believe I could set that aside.

9 THE COURT: Thank you. We are going to do prior --
10 Number 18.

11 JUROR NO. 18: I didn't initially raise my number,
12 but I don't know people personally, and I am not a
13 shareholder, but I am a Microsoft vendor. My clients are all
14 Microsoft. I wanted to share that based on the other
15 responses.

16 THE COURT: What kind of work? I know you are an
17 hourly employee.

18 JUROR NO. 18: I am an hourly employee for CRG
19 Events, but we plan corporate events for Microsoft.

20 THE COURT: Are they a fairly big company that you
21 work for?

22 JUROR NO. 18: About 50 employees.

23 THE COURT: And how often do you do Microsoft events.

24 JUROR NO. 18: I am planning them every day. It just
25 depends on the event cycle, when they fall. Ten or so per

1 year.

2 THE COURT: Would you say that is a big part of your
3 job?

4 JUROR NO. 18: Yes, my employment is dependent on
5 Microsoft's success.

6 THE COURT: Now I am asking you to set all of that
7 aside and be fair and impartial, and you could financially
8 hurt the company that gives you a lot of work. How are you
9 going to feel about trying to do that?

10 JUROR NO. 18: Conflicted. I think if things look
11 fairly equal, I will probably swings towards Microsoft.

12 THE COURT: Thank you. Appreciate your candor.
13 Number 13.

14 JUROR NO. 13: I don't speak well in front of other
15 people.

16 THE COURT: Just think of us all as your friends.

17 JUROR NO. 13: About the financial hardship, I didn't
18 think that I would have a problem, but I did -- I am
19 full-time employed, I am a single mom, and my employer only
20 pays for one week. They only reimburse my wage up to one
21 week.

22 THE COURT: Who do you work for?

23 JUROR NO. 13: Aegis Living. I am a caregiver.

24 THE COURT: Why don't you assume that I will call
25 them. I can be very persuasive, particularly when they have

1 cases in the courthouse here.

2 We will give you a break from the jury selection here.
3 One thing that drives me crazy is when you say you are a
4 judge, people start complaining about the judicial system.
5 Many times they are businesspeople. They say those run-away
6 juries, or those whatever. I ask one question, which is,
7 have you ever served on a jury? And they go, oh, no, I am
8 much too busy to do that. Well, that kind of bothers me,
9 because no wonder you don't like juries when you refuse to
10 participate in the process.

11 When you go back, talk to your employers. There are
12 really a lot of great companies in the Seattle area, big
13 employers, Boeing and Amazon are a two examples, Starbucks is
14 another, who pay their employees. And I know it is tough if
15 you are a small businessperson, but small businesspeople get
16 sued also. Speak up for jury service. I am happy to talk to
17 your employer, because I think we can work something out with
18 them.

19 Juror Number 1, you said you were on a jury once. Tell me
20 about it. Number 2, I'm sorry. Ma'am.

21 JUROR NO. 2: I have been on three juries. They were
22 all criminal. They were all local level, superior court, in
23 Whatcom County.

24 THE COURT: Were you able to reach a verdict in each
25 of them?

1 JUROR NO. 2: Yes.

2 THE COURT: That's what I need to know. Number 4.

3 JUROR NO. 4: I was on a jury for a criminal case,
4 and we reached a verdict on it.

5 THE COURT: Okay. Number 7.

6 JUROR NO. 7: King County, criminal case, more than
7 ten years ago.

8 THE COURT: And did they reach a verdict?

9 JUROR NO. 7: Sir?

10 THE COURT: Did it reach a verdict?

11 JUROR NO. 7: Yes.

12 THE COURT: Number 21.

13 JUROR NO. 21: I have been on two juries. The first
14 one was a civil case, and we reached a verdict. And the
15 second one was a criminal case, and we reached a verdict on
16 that one.

17 THE COURT: What was the civil case about, sir?

18 JUROR NO. 21: It was actually a Labor and Industries
19 claim.

20 THE COURT: All right. Number 29.

21 JUROR NO. 29: I was on one jury. It was a criminal,
22 and it was a hung jury.

23 THE COURT: How long ago was that?

24 JUROR NO. 29: Four or five years ago.

25 THE COURT: What court was it?

1 JUROR NO. 29: In Snohomish County.

2 THE COURT: Now, sometimes being on a hung jury
3 causes people to go, I never want to go through that
4 experience again. Would it have any impact serving on a jury
5 here?

6 JUROR NO. 29: I don't think so.

7 THE COURT: Number 30.

8 JUROR NO. 30: Snohomish County criminal case. It
9 never got to the jury. It lasted part of the day, and it
10 just fell apart.

11 THE COURT: Meaning there was a mistrial or someone
12 decided to plead guilty?

13 JUROR NO. 30: Yeah, I think somebody decided to
14 plead.

15 THE COURT: Anything about the experience that would
16 impact you here at all?

17 JUROR NO. 30: No.

18 THE COURT: Number 35.

19 JUROR NO. 35: Mid-1990s, King County, civil case.
20 And it resulted in a verdict.

21 THE COURT: Number 38.

22 JUROR NO. 38: I have served on two juries before.
23 The first one was about four years ago, King County Superior
24 Court, a criminal case. We did reach a decision. And then
25 in February of this year, Lake Forest Park municipal court, a

1 criminal case. We also reached a decision.

2 THE COURT: You are just lucky, twice in the same
3 year.

4 JUROR NO. 30: The first one was about four years
5 ago.

6 THE COURT: I am thinking about Lake Forest Park.
7 That is going to be a big chunk of your time potentially, now
8 that we have you here. Anything about that, or about the
9 jury process that is going to impact you being a fair and
10 impartial juror here?

11 JUROR NO. 30: I don't think so.

12 THE COURT: Counsel, at this time I am going to give
13 40 minutes to each side. We are going to do 40 minutes. And
14 then we will take a break, which is something we do a lot of
15 around here. When we take that break, what I'm going to ask
16 you to do is to leave your number on your chair, because you
17 will remember your number, and then when you come back you
18 will be able to sit down in the same spot again.

19 But at this time I am going to -- I'm not sure who is
20 doing it. Mr. Harrigan? All right. Please begin.

21 Ladies and gentlemen, they may do the same thing I did,
22 they may ask one question for the entire audience, they may
23 ask a specific person a question, they may follow up on
24 something I have talked to you about. There are different
25 ways of doing this. Mr. Harrigan.

1 MR. HARRIGAN: Thank you, your Honor. First of all,
2 I know that both parties, and the lawyers, all appreciate the
3 time that you folks are willing to take to help us resolve
4 this case, and also, obviously, the forthright manner in
5 which everybody has responded to questions. I will have some
6 questions, some general, and they may lead to more specific
7 questions to individual people.

8 The court has asked some questions that clearly anyone
9 would want to know about prospective jurors. But there may
10 be things that -- experiences you have had with either one of
11 the two companies here. Motorola is now owned by Google.
12 And by the way, one of the questions I would like to know is
13 whether anybody owns stock in Google, which I'm not sure
14 whether that question related to Motorola or Google, so we
15 wanted to clarify that.

16 But, at any rate, there may be things that have occurred
17 in your lives, somebody's lives here, that affect whether you
18 can be fair to either Motorola or Microsoft that we haven't
19 been smart enough to ask a question about. So one general
20 question that I will have is, if any of you, as you go
21 through this, if it occurs to you that you have some
22 experience that would affect your ability to be impartial to
23 these two parties, just raise your hand and let's talk about
24 it.

25 And another thing is, it may be that something has

1 occurred that you don't particularly want to talk about in
2 open court, in which case just say that, and then we can --
3 the court will tell us how to approach that issue.

4 It is possible that some of you will have heard about
5 lawsuits, that there are too many lawsuits or not enough
6 lawsuits. Anything of that sort that you honestly believe
7 would impact your views on participating here or adversely
8 affect either party would be useful to find that out.

9 I have a few questions here that I would like to ask
10 everybody. The first one, since we already know that many of
11 you have had dealings with Microsoft, is there anybody here
12 who has never heard of Microsoft?

13 That reminds me of the question somebody asked in Congress
14 about how many people use Windows. Everybody raised their
15 hands. In this case nobody raised their hand.

16 Do any of you, apart from -- we don't want to repeat the
17 conversations you have had with the court, but do any of you,
18 for any reason, have a negative view of Microsoft or a view
19 of Microsoft that in any way would impact your ability to be
20 fair and impartial to Microsoft in this case? And while we
21 are at it, the same for Motorola, although I'm sure they will
22 ask that question. What I'm looking for is the answer to the
23 specific question that we might not be the smart enough to
24 ask. Is there anything that would affect your ability to be
25 impartial in this case, in particular be fair to Microsoft?

1 Thank you.

2 I think most of you have heard of Bill Gates, and
3 Mr. Balmer, who I think is going to be retiring soon. Does
4 anyone have negative views about either of those two
5 gentlemen? Anything you have read or heard or any other
6 experience that would affect your ability to be fair and
7 impartial here?

8 Let's move on to some questions about some of the subjects
9 that will be involved in this case. Has anybody here been
10 involved in a situation where either you or another party had
11 to break a contract or not perform a contract, whether it be
12 a car purchase or a house purchase or any other kind of
13 contract? No. 33, would you tell us a little bit about that.

14 JUROR NO. 33: I am in the construction industry. On
15 occasion construction contracts have to be dealt with, where
16 a contract wasn't performed, going through the bonding
17 process, claiming things on the bond.

18 MR. HARRIGAN: You are talking about the kinds of
19 things that come up where a subcontractor runs out of money
20 or some other problem that prevents them from performing and
21 you just need to deal with that problem somehow?

22 JUROR NO. 33: That's correct.

23 MR. HARRIGAN: Has that ever led to a lawsuit in your
24 experience?

25 JUROR NO. 33: Yes. Not a lawsuit, mediation.

1 MR. HARRIGAN: Mediation. How did that process work
2 from your standpoint?

3 JUROR NO. 33: Painfully slow. But it was
4 successful, and in the end it worked out.

5 MR. HARRIGAN: The good news here is that we are on a
6 clock, so we will be done next Tuesday. It won't be
7 painfully slow. It may be painful, but not slow.

8 Anybody else been involved in a situation where either you
9 had to break a contract, cancel a contract or the party on
10 the other side didn't perform, and something was made out of
11 that? Okay. Thanks.

12 How about another contract question: These days we all
13 sign a lot more contracts than we used to, because there are
14 all these things on the internet that says "do you agree to
15 the terms and conditions," and they are 20 pages long, and
16 they are on another screen. Let's put that category aside
17 and talk about the regular types of contracts that sort of
18 preceded the internet age. Some people read every word.
19 Let's say you are buying a house or a car. Some people kind
20 of are in the middle, and some people don't look at the terms
21 at all. So on a scale of 1 to 9, let's say 1 to 3 is you
22 don't read it; and the next three are you kind of look at it;
23 and the last is you read it very carefully. How many of you
24 would be in the 1 to 3 category? How about in the middle?
25 How many of you are in the middle? And how many of you are

1 at the other extreme?

2 I think in the questions that were asked earlier, the
3 issue that came up was experience with software with respect
4 to parties. How many of you, generally speaking, have had
5 experience with software production or dealing with software
6 without regard to whether it was with Microsoft or some
7 other -- Motorola or some other company?

8 JUROR NO. 23: Somebody using software?

9 MR. HARRIGAN: My question wasn't very precise.
10 Let's leave out using software. I guess we are all using
11 software. I am talking about experience with writing
12 software, manipulating software. Let's start with Number 1.
13 Number 1, what has been your experience?

14 JUROR NO. 1: I am a software development engineer
15 and test for Microsoft.

16 MR. HARRIGAN: That's right. And Number 2.

17 JUROR NO. 2: I worked on a land-use tracking system
18 in the mid-1980s. I did some programing, really mild
19 programming, and assisted other people to understand the
20 system.

21 MR. HARRIGAN: Let's go down here in order.
22 Number 5, we have already heard from you. Number 11.

23 JUROR NO. 11: I am a software developer at
24 Microsoft.

25 MR. HARRIGAN: 12.

1 JUROR NO. 12: I started programming in the early
2 '70s, mainframe. I am an IT project manager now at Boeing.

3 MR. HARRIGAN: Where is that?

4 JUROR NO. 12: Boeing.

5 MR. HARRIGAN: Number 16.

6 JUROR NO. 16: I work in information technology as
7 well, and a little bit of development, just as a hobby.

8 MR. HARRIGAN: Number 26.

9 JUROR NO. 26: Yes. I helped develop some software
10 with my husband for Hughes Electronics, a CHINS application,
11 so you can see it was a number of years ago, for the Network
12 Enterprise Healthcare. And some other vendor presentations
13 when we were vendors for Microsoft. But that has been ten
14 years ago.

15 MR. HARRIGAN: So the time when you were vendors for
16 Microsoft was ten years ago?

17 JUROR NO. 26: I believe so, yes.

18 MR. HARRIGAN: Anyone else? Who here does not own a
19 smart phone? Number 2, is there any particular reason why
20 you have not joined the bandwagon?

21 JUROR NO. 2: I am cheap and I don't need it.

22 MR. HARRIGAN: How about Number 4?

23 JUROR NO. 4: I have never felt the need for it.

24 MR. HARRIGAN: Anybody else? Number 15.

25 JUROR NO. 15: I just haven't needed it. When this

1 one breaks, I will probably get one.

2 MR. HARRIGAN: 17.

3 JUROR NO. 17: I live in one of those rare places
4 that doesn't get cell coverage.

5 MR. HARRIGAN: So you would if you could?

6 JUROR NO. 17: Probably not.

7 MR. HARRIGAN: Number 18.

8 JUROR NO. 18: Just a way to disconnect from work
9 when I have the opportunity to.

10 MR. HARRIGAN: 19.

11 JUROR NO. 19: I just don't want one. My friends are
12 all sucked into them.

13 MR. HARRIGAN: So you have to communicate some other
14 way?

15 JUROR NO. 19: Yeah. With my mouth usually.

16 MR. HARRIGAN: Number 21.

17 JUROR NO. 21: The pressure is on at home, but we
18 just have regular cell phones at this point.

19 MR. HARRIGAN: Number 24.

20 JUROR NO. 24: I agree with Number 18, a way to not
21 be accessible to work all the time.

22 MR. HARRIGAN: I think some of us think of them as
23 necessary evils. It would be nice if they weren't always
24 necessary. Anybody else?

25 How about the same question, a tablet, like an iPad or

1 something like that. Who does not own one of those?

2 Number 3, what's your feeling about that?

3 JUROR NO. 3: I don't have a use for a tablet right
4 now. I have a laptop. I don't want to buy one at the
5 moment.

6 MR. HARRIGAN: Juror Number 2, you don't have a
7 tablet. Do you have a laptop?

8 JUROR NO. 2: I have a laptop. I probably spend some
9 where between 10 and 12 hours a day in front of a computer.
10 I don't need any additional --

11 MR. HARRIGAN: Number 4.

12 JUROR NO. 4: I have a life already.

13 MR. HARRIGAN: Who else was there back there?
14 Number 7.

15 JUROR NO. 7: I have a laptop and an iPhone. I don't
16 need -- I'm not ready --

17 MR. HARRIGAN: I have one of those things, but I
18 never take it out for the same reason. In the back row
19 there, Number 8.

20 JUROR NO. 8: A smart phone and computer is enough.

21 MR. HARRIGAN: Number 15 again.

22 JUROR NO. 15: My wife has one, so I use it once in a
23 while. It is basically a giant smart phone.

24 MR. HARRIGAN: I missed the juror --

25 JUROR NO. 14: I don't need it. I have a computer

1 and an iPhone.

2 MR. HARRIGAN: Number 17.

3 JUROR NO. 17: No need for that connectivity.

4 MR. HARRIGAN: Number 18.

5 JUROR NO. 18: I use Surface on site as an event
6 tool.

7 JUROR NO. 19: My computer is enough for me.

8 MR. HARRIGAN: 23.

9 JUROR NO. 23: I have a smart phone, a laptop,
10 desktop, and work on both computers. Don't need another.

11 MR. HARRIGAN: Another.

12 JUROR NO. 24: I also don't have an iPad.

13 MR. HARRIGAN: 25.

14 JUROR NO. 25: I don't have one.

15 MR. HARRIGAN: I know some people that basically use
16 them just like a computer. They don't have a computer
17 anymore. I like that -- I am more comfortable with the
18 laptop. Number 27.

19 JUROR NO. 27: I own a computer.

20 MR. HARRIGAN: Number 28.

21 JUROR NO. 28: It is on my Christmas list.

22 MR. HARRIGAN: 29.

23 JUROR NO. 29: My laptop is sufficient.

24 THE COURT: Anybody else? 36. We can't hear you.

25 JUROR NO. 36: (Inaudible.)

1 THE COURT: I didn't hear that. Can you say that
2 again?

3 JUROR NO. 36: I just don't have the money to buy a
4 tablet.

5 THE COURT: Thank you.

6 UNIDENTIFIED JUROR: I don't need it. I have a smart
7 phone and two other computers.

8 MR. HARRIGAN: Does anybody here have his or her own
9 blog that you work on to any degree? Number 28. What is it
10 about?

11 JUROR NO. 28: It is called Excess Freight. It is
12 about unhealthy truck drivers.

13 MR. HARRIGAN: About?

14 JUROR NO. 28: Unhealthy truck drivers.

15 MR. HARRIGAN: Do you have a lot of readers?

16 JUROR NO. 28: Yeah, there are a lot of truck drivers
17 carrying excess freight.

18 MR. HARRIGAN: Did I see somebody else? Number 27.

19 JUROR NO. 27: Yeah, I have one for my real estate
20 business.

21 MR. HARRIGAN: For your?

22 JUROR NO. 27: For real estate.

23 THE COURT: Sir, I will need you to stand up.

24 JUROR NO. 27: I have a blog for my real estate
25 business. It is a website.

1 MR. HARRIGAN: That takes care of that question.
2 Nobody else is in that category?

3 Have any of you ever called in to a radio or TV show to
4 answer a question or make a comment or otherwise appear on
5 the airwaves? Number 1, tell us about that.

6 JUROR NO. 1: I called in to a sports talk show once.
7 Yeah.

8 MR. HARRIGAN: How was it?

9 JUROR NO. 1: I am an introvert, so it wasn't all
10 that exciting, and they didn't like my opinion.

11 MR. HARRIGAN: Number 2.

12 JUROR NO. 2: We have a little morning show up in
13 Bellingham, and I call in every once in a while. Trivia
14 questions, where did the word Halloween come from. Stuff
15 like that. Occasionally you listen to all of the wrong
16 answers and you force yourself to answer it.

17 MR. HARRIGAN: Where did the word Halloween come
18 from.

19 JUROR NO. 2: It is the day before All Hallows Eve,
20 which is the first day of November. So it is the ween of All
21 Hallows Eve.

22 MR. HARRIGAN: I had heard that before, but have
23 forgotten it.

24 JUROR NO. 5: I was once on David Letterman show as
25 an attendee.

1 MR. HARRIGAN: Impressive. Anybody else? Number 23.

2 JUROR NO. 23: I have been asked to be on quite a lot
3 of radio shows and television shows in the context of my
4 work.

5 MR. HARRIGAN: What are some of those --

6 JUROR NO. 23: For example, NPR the local KUOW, but
7 also on national NPR for Science Friday, Talk of the Nation
8 back when that was on, most of the national television
9 networks, and CBC, BBC and so on.

10 THE COURT: Dr. King, now you are going to make me do
11 this. Would you like to stand up and introduce yourself?
12 This is a real hero in our community. Would you introduce
13 yourself?

14 JUROR NO. 23: Thank you. You would like my name?

15 THE COURT: I want you to explain to them what you
16 do.

17 JUROR NO. 23: In this context it is that I developed
18 the sequencing approach called mitochondrial DNA sequencing.
19 I developed it for the purpose of reuniting Argentinian
20 kidnapped grandchildren with their grandparents. It is used
21 internationally in forensic cases everywhere. That has kept
22 me off every criminal trial since 1981. But I don't believe
23 it has any bearing on this case at all.

24 MR. HARRIGAN: Anyone else? Number 2.

25 JUROR NO. 2: Nowhere near that level. But I have

1 been interviewed on radio, television, as part of my job.

2 MR. HARRIGAN: What subject?

3 JUROR NO. 2: Environmental planning, urban planning
4 in Whatcom County, in Bellingham.

5 MR. HARRIGAN: May I have a moment to check with my
6 colleagues to see if they can figure out anything else I
7 should be doing?

8 THE COURT: Yes.

9 MR. HARRIGAN: No further questions, your Honor.
10 Thank you all very much for your responsiveness.

11 THE COURT: Ms. Sullivan. Ladies and gentlemen, I
12 would like you to now give your attention to Ms. Sullivan,
13 who will be doing the same thing on behalf of Motorola.

14 MS. SULLIVAN: Good morning, ladies and gentlemen. I
15 just want to say, on behalf of all of our team for Motorola,
16 how grateful we are to you for coming out to be -- prepared
17 to serve as jurors. We are extremely grateful for your time,
18 for your candor, for your patience and your attention. I
19 just want to express our great gratitude to you for being
20 here, whatever happens in the rest of the day.

21 I would like you to answer a few questions. You have
22 answered a lot of questions already, and you have answered
23 them truthfully, and that's very helpful to us. I just
24 wanted to ask a few in addition to those the judge has asked
25 you and that Mr. Harrigan has asked you.

1 I don't know if you are like any folks in my family, but
2 are any of you union members? Raise your hand if you are a
3 member of a union.

4 JUROR NO. 2: Now or ever?

5 MS. SULLIVAN: Now or ever been the member of a
6 union, please raise your hands. I will ask you a few
7 follow-up questions. Juror Number 2, did you ever have any
8 leadership position in your union?

9 JUROR NO. 2: No.

10 MS. SULLIVAN: Juror number 4?

11 JUROR NO. 4: No.

12 MS. SULLIVAN: Can you tell us what union you were
13 in?

14 JUROR NO. 4: I am a part-time teacher in a community
15 college, and you are automatically enrolled when you accept
16 the position.

17 MS. SULLIVAN: Understood. Thank you. Juror
18 Number 6, what union?

19 JUROR NO. 6: A few of them, restaurants, when I was
20 going through college.

21 MS. SULLIVAN: Service Employees Union. Any
22 leadership positions?

23 JUROR NO. 6: No.

24 MS. SULLIVAN: Thank you. Number 7.

25 JUROR NO. 7: National Treasurer Employees Union.

1 MS. SULLIVAN: Anybody in the back row that I missed?
2 Juror Number 8.

3 JUROR NO. 8: Some years ago at the University of
4 Washington, no leadership.

5 MS. SULLIVAN: Juror number 14.

6 JUROR NO. 14: Service employees, no leadership.

7 MS. SULLIVAN: Ladies and gentlemen, Juror Number 21.

8 JUROR NO. 21: United Steel Workers, no leadership
9 position.

10 MS. SULLIVAN: Juror Number 23.

11 JUROR NO. 23: AFSCMI when I was a graduate student.
12 No leadership.

13 MS. SULLIVAN: Juror Number 25.

14 JUROR NO. 25: (Inaudible.)

15 MS. SULLIVAN: Thank you. Number 28, you may have to
16 stand up.

17 JUROR NO. 28: I don't remember the name. It was
18 with the Washington State Patrol. I left.

19 MS. SULLIVAN: I missed some people in the back row.
20 Juror Number 36. I'm sorry, Juror Number 32. We will go
21 with you first.

22 JUROR NO. 36: I was with the CWA. Now I supervise
23 the CWA.

24 THE COURT: Ma'am, you need to stand up.

25 JUROR NO. 36: I was with CWA, and now I supervise

1 the CWA.

2 MS. SULLIVAN: You are a supervisor.

3 JUROR NO. 36: Yes.

4 MS. SULLIVAN: Juror Number 33.

5 JUROR NO. 33: International Brotherhood of
6 Electrical Workers.

7 MS. SULLIVAN: IBEW. Thank you very much, sir.
8 Juror Number 36.

9 JUROR NO. 36: SCIU, no leadership.

10 MS. SULLIVAN: SCIU, no leadership. Thank you.
11 Anybody I missed? Juror Number 40.

12 JUROR NO. 40: SCIU, no leadership.

13 MS. SULLIVAN: Thank you very much for answering my
14 questions. You were very candid in your forms about where
15 you worked. This is one more question we had for some of
16 you.

17 Now, I would like to ask, does anybody on the jury pool,
18 in the jury pool, or any member of your family own a
19 business, anybody own a business? Mind if I just ask you a
20 few questions? Juror Number 8, what kind of business?

21 JUROR NO. 8: You said in the family. My father owns
22 a business.

23 MS. SULLIVAN: It is still operating?

24 JUROR NO. 8: It is a really small business.

25 MS. SULLIVAN: What kind of business?

1 JUROR NO. 8: Rescreening screens.

2 MS. SULLIVAN: Rescreening screens. I missed one
3 here. Juror Number 1.

4 JUROR NO. 1: My mom was a dentist, owned a dental
5 office.

6 MS. SULLIVAN: Thank you. Juror Number 7.

7 JUROR NO. 7: My wife is a piano instructor.

8 MS. SULLIVAN: She owns her own piano instruction
9 business. In the back now, Juror Number 16.

10 JUROR NO. 16: My uncle owns a clothing store.

11 MS. SULLIVAN: Still operating?

12 JUROR NO. 16: Yes.

13 MS. SULLIVAN: Yes, ma'am.

14 JUROR NO. 28: I am an independent caregiver, so
15 that's my business, plus the Excess Freight.

16 MS. SULLIVAN: Blog. I didn't mean to miss Juror
17 Number 26.

18 JUROR NO. 26: I have a consulting firm. My husband
19 has a -- mainly in risk management to small start-up
20 companies in the software industry and major healthcare
21 enterprises.

22 MS. SULLIVAN: Thank you very much. That is still
23 operating?

24 JUROR NO. 26: Yes.

25 MS. SULLIVAN: Juror 16.

1 JUROR NO. 16: For years my wife ran a home daycare.
2 MS. SULLIVAN: Thank you. Who did I miss back here?
3 31.
4 JUROR NO. 31: My sister and I own a ranch.
5 THE COURT: Once again, ma'am, you need to stand up.
6 You have a soft voice.
7 JUROR NO. 31: My sister and I own a ranch in
8 Montana.
9 MS. SULLIVAN: That is operated as a business?
10 JUROR NO. 31: Yes. But it is not my full-time job.
11 MS. SULLIVAN: What kind of ranch?
12 JUROR NO. 31: A Cattle ranch.
13 MS. SULLIVAN: Cattle/dairy both?
14 JUROR NO. 31: No dairy.
15 MS. SULLIVAN: Who did I miss that owns a business or
16 knows an immediate family member that does? Number 32.
17 JUROR NO. 32: My significant other owns and operates
18 a software business. I know nothing about it.
19 MS. SULLIVAN: 33.
20 JUROR NO. 33: My son-in-law's parents own a cleaning
21 business.
22 MS. SULLIVAN: Still operating?
23 JUROR NO. 33: Yes.
24 MS. SULLIVAN: Did I miss anyone on owning a
25 business? Juror Number 13.

1 JUROR NO. 13: My grandmother owns a clothing
2 business. It is closing.

3 MS. SULLIVAN: Who does?

4 JUROR NO. 13: My grandmother.

5 MS. SULLIVAN: Still operating?

6 JUROR NO. 13: No, it is closing this year.

7 MS. SULLIVAN: Anyone else? Juror Number 38.

8 JUROR NO. 38: After my husband left Microsoft, he
9 started his own business where he designs and manufactures
10 custom parts for racing motorcycles.

11 MS. SULLIVAN: He is still operating that?

12 JUROR NO. 38: Yes.

13 MS. SULLIVAN: Did I miss anyone on owning your own
14 business or family member that does? Thank you very much for
15 filling us in on that.

16 I would like to turn next to something that was touched on
17 before by the judge, but I just want to be sure we know if
18 any of you or an immediate family member was ever a plaintiff
19 or a defendant in a lawsuit. Let's start with anyone who was
20 ever a plaintiff in a lawsuit. Can you raise your number?
21 Juror Number 12.

22 JUROR NO. 12: I'm not sure I understand plaintiff
23 currently. It was a class action suit.

24 MS. SULLIVAN: You were a member of a large class?

25 JUROR NO. 12: Yeah.

1 MS. SULLIVAN: You weren't personally involved in
2 bringing the lawsuit?

3 JUROR NO. 12: No.

4 MS. SULLIVAN: How many were personally involved in
5 bringing a lawsuit?

6 JUROR NO. 40: I had a landlord issue, and this was
7 in Texas, but we were advised towards the end of it that we
8 would most likely lose, just to drop the case altogether.

9 MS. SULLIVAN: Okay. Thank you very much. Juror
10 Number 16.

11 JUROR NO. 16: I was involved in a landlord/tenant
12 situation. It was against a landlord that owed us some
13 money.

14 MS. SULLIVAN: How did it resolve?

15 JUROR NO. 16: I was ordered a favorable ruling.

16 MS. SULLIVAN: Juror Number 23.

17 JUROR NO. 23: This may be not be direct enough for
18 your purpose, but for the sake of completeness, the Myriad
19 case that recently went to the Supreme Court, I was not
20 involved directly as a plaintiff, although I was certainly
21 involved in the history of the case, but I was president of
22 the American Society of Human Genetics which submitted an
23 Amicus brief.

24 MS. SULLIVAN: A friend of the court brief. Anybody
25 else that has been a plaintiff?

1 Let me turn to the other side. I think we heard from a
2 juror earlier who had been in a litigation dispute. Has
3 anyone ever been in a litigation dispute where you or an
4 immediate family member was the defendant in a lawsuit, the
5 person being sued? Anyone?

6 Anyone personally involved in being part of a defendant --
7 your company or your business being the defendant in a suit
8 where you had to participate? Juror Number 33.

9 JUROR NO. 33: Again, I mentioned earlier we had
10 mediation for a subcontractor issue. We didn't end up going
11 to actual litigation. It was binding arbitration.

12 MS. SULLIVAN: Thank you, Juror Number 33. I was
13 thinking of you. I was wondering if anyone else had an
14 experience like Juror Number 33 they had a chance to tell us
15 about it. Did I miss someone over here? Juror Number 2,
16 thank you.

17 JUROR NO. 2: The City of Bellingham was sued in
18 violation for the Growth Management Act, and I testified in
19 that case.

20 MS. SULLIVAN: And what was your role, just as a
21 witness?

22 JUROR NO. 2: Just a witness.

23 MS. SULLIVAN: You weren't a party to the case?

24 JUROR NO. 2: No.

25 MS. SULLIVAN: Did you form a view of how the

1 litigation went?

2 JUROR NO. 2: By that time I had been on three
3 juries, so it seemed very straightforward to me.

4 MS. SULLIVAN: Very good. Thank you. I want to turn
5 now to something that Mr. Harrigan mentioned to you before,
6 but I want to go a little bit further. He reminded you that
7 there are some very famous names involved in the case. There
8 is Microsoft. And then, of course, there is Bill Gates. A
9 lot of you certainly recognize that name, and his wife
10 Melinda Gates. And they have a foundation. I would just
11 like to know if any members of the jury pool has ever
12 received or been part of a charitable organization that has
13 received any charitable donations from either Microsoft, or
14 from the Bill and Melinda Gates Foundation. Raise your
15 number if that sounds familiar to you.

16 Can we go through quickly? Juror Number 1.

17 JUROR NO. 1: As an employee of Microsoft, they pay
18 money to anything that I volunteer in.

19 MS. SULLIVAN: Juror Number 8.

20 JUROR NO. 8: Does it qualify, the University of
21 Washington? There has been a lot of benefits. I have been
22 an employee there, and I appreciate all of the philanthropy.
23 Tough word.

24 MS. SULLIVAN: Thank you for your candor. Anyone on
25 this side of the jury pool? If not, let me turn to a number

1 of signs here. Juror Number 18.

2 JUROR NO. 18: Actually, just my mom has received
3 grants for her classroom. My only non-Microsoft client is
4 the Bill and Melinda Gates Foundation.

5 MS. SULLIVAN: Thank you for that. Juror Number 20.

6 JUROR NO. 20: Are we sticking to just the charitable
7 contributions from --

8 MS. SULLIVAN: From Microsoft or the Gates
9 Foundation, yes.

10 JUROR NO. 20: The company I works for is privately
11 associated with the Gates Foundation, working on the
12 construction of the campus.

13 MS. SULLIVAN: Say that a little more clearly for us,
14 if you could, and a little more loudly.

15 JUROR NO. 20: It is not charitable, it is private.
16 They hired us as engineers to work on the campus.

17 MS. SULLIVAN: Understood. Number 23.

18 JUROR NO. 23: I am a member of the Genome Sciences
19 Department at the University of Washington, and this
20 department exists because the Gates family gave money to
21 found it.

22 MS. SULLIVAN: Thank you. Number 25.

23 JUROR NO. 25: I work for the Girl Scouts of Western
24 Washington, and they do a lot of partner/sponsorship work.

25 MS. SULLIVAN: That would include charitable

1 donations from Microsoft?

2 JUROR NO. 25: Yes.

3 MS. SULLIVAN: Thank you. Juror Number 27.

4 JUROR NO. 27: I worked at Overlake many years ago.
5 I know they had a plaque that said there was a donation to
6 Overlake from the Foundation.

7 MS. SULLIVAN: Thank you. Anybody -- Juror 38.

8 JUROR NO. 38: When my husband worked at Microsoft
9 they had a 100 percent matching program. So any charitable
10 organization that my husband and I worked with or gave money
11 to, they donated 100 percent.

12 MS. SULLIVAN: Juror Number 40.

13 JUROR NO. 40: As others mentioned, they worked for
14 the University of Washington Medical Center, I do, too. I
15 have been there for 25 years.

16 MS. SULLIVAN: Did I miss anyone on the Microsoft or
17 Gates Foundation charitable contributions? Juror Number 24.
18 Thank you.

19 JUROR NO. 24: Similar, working for the University of
20 Washington.

21 MS. SULLIVAN: Juror Number 31.

22 JUROR NO. 31: The same, UW Med Center.

23 MS. SULLIVAN: Are you personally aware of those
24 contributions?

25 JUROR NO. 31: Particularly the grant submissions

1 that they have, the Bill and Melinda Gates Foundation.

2 MS. SULLIVAN: Sometimes grants are granted by the
3 foundation to yourself or to people you work with?

4 JUROR NO. 31: (Inaudible.)

5 MS. SULLIVAN: Number 5.

6 JUROR NO. 5: Just so I understand, whether you have
7 made or received a contribution?

8 MS. SULLIVAN: Received a contribution. I understand
9 if you are working for Microsoft you may have made one.
10 Thank you for sharing that information. I greatly appreciate
11 it.

12 I want to ask you next, the judge asked you earlier
13 whether you recognize the name Google. He told you that
14 Google is now the owner of Motorola Mobility. This lawsuit
15 began when my client included Motorola Mobility, the cell
16 phone company. But now the company Google has acquired
17 Motorola Mobility. I wanted to ask whether any of the
18 members of the jury have strong opinions, favorable or
19 unfavorable, about Google? No opinions about Google that are
20 strong one way or the other? I see some people thinking.
21 Anybody have a strong negative or positive opinion about
22 Google? Juror Number 12.

23 JUROR NO. 12: It is my search engine of choice.

24 MS. SULLIVAN: Thank you. That's very honest. Juror
25 number 26.

1 JUROR NO. 26: I think it balances out. That's why I
2 have been thinking back and forth. I think most of us don't
3 like, from time to time, what Google does with privacy. But
4 at other times the other things that they do seem very good.
5 It balances.

6 MS. SULLIVAN: When you say things they do with
7 privacy, what do you have in mind?

8 JUROR NO. 26: It seems that we have to sign away a
9 great deal of our privacy in order to access Google benefits.
10 They changed them. I'm not totally aware of when they
11 changed them. Sometimes they send a notice saying that they
12 are changing things. That's as far as I want to go. But I
13 think it balances.

14 MS. SULLIVAN: Thank you very much. I noticed that,
15 as is not too surprising here in Seattle, quite a few of you
16 have friends who work at Microsoft. And I just wanted to ask
17 you to think very hard about whether you think having
18 friends, former coworkers who work at Microsoft, might cause
19 you to lean even slightly toward Microsoft before you hear
20 the evidence and the instructions from the judge in this
21 case. Think hard for a minute. It is just lots of you are
22 going to have such friends. I just wanted you to think about
23 whether having friends who work at the Microsoft Corporation
24 would give you any tendency to lean slightly in Microsoft's
25 favor when it comes to deciding the case based on the

1 evidence and the instructions the judge will give you.

2 Having thought about that question, is there anyone here
3 who feels that their friendships with folks who work at
4 Microsoft might affect your view of the evidence in the case?
5 Juror Number 26.

6 JUROR NO. 26: A subjective feeling, I guess it would
7 be 56 out of 100. I don't think that is enough to make a
8 difference. I think I can handle that.

9 MS. SULLIVAN: Obviously those of you who work at
10 Microsoft, and we have discussed that, we obviously
11 understand that you have many coworkers at Microsoft, you
12 don't need to follow up on that.

13 THE COURT: Counsel, you have a number.

14 MS. SULLIVAN: I'm sorry. Juror Number 30.

15 JUROR NO. 30: Yeah, I have worked at Microsoft since
16 the late '80s. Everybody I know my entire working life has
17 been there.

18 MS. SULLIVAN: Your Honor, were you able to hear that
19 answer? Thank you very much. A question quickly about
20 Motorola products. We heard from a number of the jurors that
21 you have experience using Motorola products or are currently
22 using Motorola products. Do any of you have any issues with
23 your Motorola products, any negative experiences? Could you
24 please raise your number if you do? Juror Number 8.

25 JUROR NO. 8: Well, it was a while ago. It was like

1 five years ago, and I got a phone and it was a really bad
2 phone.

3 MS. SULLIVAN: Did you get another one?

4 JUROR NO. 8: No, I did not.

5 MS. SULLIVAN: Ever again?

6 JUROR NO. 8: From Motorola? No, I didn't.

7 MS. SULLIVAN: You never got a Motorola phone. You
8 got a different company's phone?

9 JUROR NO. 8: Yes.

10 MS. SULLIVAN: Thank you for sharing that. Did you
11 have a Motorola issue? Anybody else on this part of the jury
12 have an issue with a Motorola product? No one. All right.

13 I think that covers all of the general questions we had to
14 ask you. I would just ask your patience in asking a few
15 questions to individual jurors who brought some things up in
16 the questionnaire or here in court that we would like to
17 explore a little bit further. And I just need to follow up
18 on things you have already told us. It will be very brief.

19 I wonder if we could start, Juror Number 26, with you.
20 You mentioned that your husband filed a patent application
21 with Microsoft. Can you tell us what that patent application
22 was for?

23 JUROR NO. 26: Yes. At that time he was an
24 architect -- software architect for Microsoft. And then he
25 filed six patents that I am aware of in the context of his

1 employment there. Most of them were on process.

2 MS. SULLIVAN: That was how long ago?

3 JUROR NO. 26: I guess about five years, maybe more.
4 I have forgotten. Let's see -- What year is it? It's '13.
5 Probably culminating around 2004, 2005, somewhere in there.

6 MS. SULLIVAN: Thank you. Juror Number 27, you
7 mentioned to us that your father-in-law works at Microsoft.
8 Can you tell us what your father-in-law does at Microsoft?

9 JUROR NO. 27: I believe a project manager.

10 MS. SULLIVAN: Do you talk to him about his work at
11 Microsoft.

12 JUROR NO. 27: Not a lot. I probably see him twice a
13 month.

14 MS. SULLIVAN: Twice a month? Juror Number 30. Can
15 you just remind me where you're sitting? You already told us
16 what -- you were very candid with us. Just to be clear, your
17 work at Microsoft was prior -- it was previous to now?

18 JUROR NO. 30: It started in the '80s as a vendor,
19 and then an employee for 14 years, and a few years off, and
20 then went back as a vendor. So it has pretty much been my
21 entire life.

22 MS. SULLIVAN: Employer and vendor relationship.
23 Thank you very much.

24 Juror Number 35. Thank you for standing. You mentioned
25 you know people at Microsoft that includes in-house counsel.

1 Could you tell us whether you think knowing in-house counsel
2 for Microsoft would make you more disposed to believe, say,
3 Microsoft's lawyers rather than Motorola's lawyers?

4 JUROR NO. 35: I don't think so. I do work with
5 Microsoft in-house counsel fairly regularly. So it is a
6 fairly active relationship.

7 MS. SULLIVAN: Could you estimate how many hours a
8 week?

9 JUROR NO. 35: Probably by month I would say ten to
10 fifteen.

11 MS. SULLIVAN: Anyone else who had a relationship
12 with people who work at Microsoft who wants to add anything
13 to what you have said already? Yes, Juror Number 33.

14 JUROR NO. 33: Your question kind of changed a little
15 bit in terms of -- it kind of went towards do you know
16 anybody at Microsoft.

17 MS. SULLIVAN: I'm sorry. I was imprecise there. I
18 know that a lot of you know people at Microsoft. What I am
19 really asking here is do you know people at Microsoft in such
20 a close capacity, like being a vendor or working with
21 in-house counsel. If you don't have that relationship, I
22 don't mean to bother you any further.

23 JUROR NO. 33: I only know one Microsoft person.
24 That is a personal relationship/friendship outside of
25 Microsoft. I don't even know if the person worked at -- I

1 do have to say, if he can't -- if he isn't at the top, he can
2 probably see the top.

3 MS. SULLIVAN: Thank you. Juror No. 11.

4 JUROR NO. 11: My husband, he also works at
5 Microsoft, and he did file a patent.

6 MS. SULLIVAN: Filed a patent with Microsoft?

7 JUROR NO. 11: Yes.

8 MS. SULLIVAN: That was successful?

9 JUROR NO. 11: Yes.

10 MS. SULLIVAN: Thank you for sharing that. Your
11 Honor, may I have one minute? Did I miss a juror? Juror
12 Number 16.

13 JUROR NO. 16: I had previously worked for a company
14 that had sold Microsoft products, and made brief
15 acquaintances with Microsoft employees. But I have no idea
16 if they would still be employed by Microsoft.

17 MS. SULLIVAN: Thank you very much. Anyone else on
18 close relationship with Microsoft employees beyond mere
19 friendship? Juror No. 22.

20 JUROR NO. 22: I have a brother who works for the
21 Bill and Melinda Foundation.

22 MS. SULLIVAN: Your brother works for the Bill and
23 Melinda Gates Foundation?

24 JUROR NO. 22: Yes.

25 MS. SULLIVAN: Anyone else?

1 Your Honor, may I confer for one moment? Thank you,
2 ladies and gentlemen. You have been extremely patient. I
3 want to say we are extremely grateful for your
4 thoughtfulness, your candor with the process.

5 I just have one final question for the panel. I just want
6 you ask you to think about whether there is anything in your
7 experience or your opinions as you have heard about this case
8 that you haven't told us about that you think might
9 influence, even slightly, your ability to be fair and
10 impartial in this case, and to listen to the evidence in the
11 case, and the judge's instructions in the case? Anything at
12 all you can think of that might lead you to have something to
13 tell us about an opinion or an experience that might make it
14 hard for you to be impartial?

15 I will give you a minute to think. I don't see any
16 numbers. So with that, your Honor, thank you very much.
17 Motorola is done questioning the jury. Thank you very much,
18 ladies and gentlemen.

19 THE COURT: Ladies and gentlemen, Ms. Sullivan just
20 asked a question that I normally ask, which is, sometimes
21 when you sit here and you hear other people talk something
22 occurs to you, some issues came up. A number of you were
23 aware of some philanthropic activity by either Microsoft or
24 the Gates family. Is there anything that I have asked you
25 already about being a fair and impartial juror that those

1 questions have triggered some additional thoughts that you
2 would like to share with us? I don't see any more hands.

3 I will tell you, that this is a really great jury pool.
4 If all of our jury pools could be this much fun and also this
5 well informed this would be a great job. It already is a
6 pretty special job.

7 I will give you about 20 minutes. We will be working
8 while you're out enjoying the view or wherever you want to
9 go. Please leave your number on your chair. That way, when
10 you come back you will know where to sit.

11 These are really smart people, as you have figured out,
12 but they haven't memorized all of your names yet. When we
13 come back they have the right to ask three of you to be
14 excused. They have to explain to me why, but it is something
15 that isn't done publicly. There are some reasons why they
16 can't ask you to be excused and there are other reasons they
17 can, if they feel you just wouldn't be a fair and impartial
18 juror. To do that, they pass a sheet of paperback back and
19 forth. It is more helpful if you are sitting there so they
20 can go, 1, 2, 3, and figure out which one you are, since they
21 designate by number.

22 It is five after 11:00. I would ask you to be back in
23 your seats by about 11:25, with the incentive that if we get
24 the next process done, the jury will know who the jury is,
25 and I can release the rest of you. I'm sure that will urge

1 you to be on time.

2 Counsel, I will see you at sidebar.

3 (Sidebar conference out of the hearing of the jury.)

4 THE COURT: Counsel, thank you. That is an unusually
5 well-educated jury out there. That was a bit of a surprise.
6 What I'm going to do now is I'm going to tell you those
7 people that I'm inclined to remove from the jury. There are
8 some definites, and then there are some I would like to talk
9 to you about, and then ask if there is anyone you think we
10 should remove who I haven't mentioned.

11 Juror Number 1 is a Microsoft shareholder and employee who
12 said he couldn't be fair. He is gone.

13 Juror Number 4 says -- I believe it was a she, was pro
14 Microsoft, and therefore I have removed her.

15 Juror Number 5 works, apparently, for Microsoft, but
16 answered the question can be fair, and therefore, at least
17 for the time being, I am leaving that person on.

18 Number 6 is the first of the economic hardship people. He
19 is the salesman for Sleep Country. If anyone doesn't know
20 what Sleep Country is, they are a mattress -- a
21 well-publicized cheap mattress outfit. As I think I told you
22 in the pretrial conference, I am a sucker for economic
23 hardship. If they don't want to be here, I don't think they
24 would make good jurors. Is there anyone who objects to
25 removing 6?

1 MS. SULLIVAN: No, your Honor.

2 MR. PRITIKIN: We do not, your Honor.

3 THE COURT: Then 6 is gone.

4 Number 11 is the Microsoft employee who is moving on
5 Wednesday. She said she couldn't be fair, so 11 is gone.

6 18 is the hourly employee who does events, and said she
7 couldn't be fair. So I have removed 18.

8 Number 20 is the next economic hardship. That's the
9 person who has a project due, and then he had a vacation, and
10 he had two other reasons why he couldn't possibly serve as a
11 juror. Any objection to removing him?

12 MS. SULLIVAN: No objection.

13 THE COURT: 20 is gone.

14 22 is the woman who works at a mental health counseling
15 organization, who noted on her form that she has English
16 issues. She also said that she didn't think she could be
17 fair. So I have removed her.

18 24 was the medical safety officer at the University of
19 Washington. The University of Washington has lots of medical
20 safety officers, so she gets to stay.

21 Juror Number 23, by the way, is quite famous around here.
22 She is an extremely accomplished person. I haven't looked at
23 those briefings for a while, I don't know if you were
24 involved in that case, but I think she also has a role in the
25 gene for women's breast cancer.

1 MS. SULLIVAN: That's correct, your Honor.

2 THE COURT: 25 is the one who says she is going on
3 vacation next week for the entire week. I would remove 25.
4 Any objection?

5 MS. SULLIVAN: No objection.

6 MR. PRITIKIN: No objection.

7 THE COURT: 27 is the young man who said he had to
8 pick his child up for childcare. That is pretty iffy, but he
9 says he doesn't really have anyone else to do it. I would be
10 inclined to remove him. We have lots of jurors. Any
11 objection?

12 MS. SULLIVAN: No objection.

13 MR. PRITIKIN: No objection.

14 THE COURT: 27 is gone. 30, Ms. Sullivan got her to
15 say she can't be fair, so she is gone. That was a surprise.
16 We asked that question three times before.

17 35 is a lawyer for the Perkins Coie firm. They do work, I
18 think, for both sides. Apparently she doesn't do the Google
19 trademark work. She said she could be fair. If you want, I
20 will hear argument on 35, but I don't think I have enough to
21 remove her.

22 And I don't think we will ever get to 37, but that was the
23 massage therapist who said he had an economic hardship. So I
24 have removed 37.

25 MS. SULLIVAN: No objection.

1 MR. PRITIKIN: No objection.

2 THE COURT: Let me recap then. The court has struck
3 1, 4, 6, 11, 18, 20, 22, 25, 27, 30 and 37. And I will hear
4 argument on others. Mr. Harrigan. Mr. Pritikin.

5 MR. PRITIKIN: There are none others that we are
6 asking to be excused for cause, your Honor.

7 THE COURT: Okay. Ms. Sullivan.

8 MS. SULLIVAN: Your Honor, several more for cause due
9 to a relationship with Microsoft. With respect, we would
10 like to strike for cause Juror Number 5. Notwithstanding his
11 answer that he could be fair, he later answered that he works
12 for Microsoft and has a lot of close associations with
13 coworkers and has made donations to the Gates Foundation. We
14 think Juror Number 5, like Juror Numbers 1 and 11, should be
15 struck because of his relationship with Microsoft.

16 THE COURT: How do I get around the "I can be fair
17 response"?

18 MS. SULLIVAN: I think, your Honor, it is simply that
19 he has a financial interest, and that a financial interest
20 often colors our own ability to be fair.

21 THE COURT: All right. Let me think about that one.
22 I will give you an answer in a moment here. Who else?

23 MS. SULLIVAN: We would also respectfully ask that
24 you strike Juror Number 38, who is the juror who said she has
25 a husband who retired from Microsoft, and that -- I think for

1 the same reason, financial interest.

2 THE COURT: You actually won't get to 38. What does
3 Microsoft think on that one?

4 MR. PRITIKIN: She said she could be fair. We would
5 take her at her word, your Honor.

6 THE COURT: The fact that he is retired, I don't
7 think, without some showing that he is receiving a pension or
8 whatever, which I don't believe to be true, I am not going to
9 sustain 38.

10 MS. SULLIVAN: Your Honor, I just have one more for
11 cause because of the financial interest in Microsoft. And
12 that is Juror Number 35. We do think that she said she works
13 10 to 15 hours a week on a Microsoft account, and we think
14 that being a lawyer -- outside counsel for Microsoft really
15 should lead you to excuse her for cause.

16 THE COURT: Mr. Pritikin.

17 MR. PRITIKIN: Again, she said she could be fair. I
18 think her firm does work for both companies. Unlikely we
19 will get that far anyway. I see no reason.

20 THE COURT: I will strike Number 35. She is a
21 partner, which means she has a financial interest in an
22 entity, which means she is a direct customer of Microsoft.
23 It seems to me that is sufficient.

24 Any others? Number 5 is pending.

25 MS. SULLIVAN: Your Honor, we had several -- we noted

1 several other jurors that owned Microsoft stock, some of them
2 also owned Google stock. Some of them only owned Microsoft
3 stock. Is your Honor inclined to strike anyone who said they
4 owned stock in either company?

5 THE COURT: No. I asked -- We had people out there
6 on both sides of that question. And I asked if it would
7 influence them one way or the other, and the answer was no.
8 I am not inclined -- If we did that -- Around here you've
9 got 30,000 employees in the Puget Sound area, you have a lot
10 of shareholders. This just happens to be one of the parts of
11 the country where there are a lot of investors in that
12 industry.

13 I am going to take 5 off, even though he says he can be
14 fair. His body language and such when he was giving those
15 answers wasn't convincing to me.

16 MS. SULLIVAN: Thank you, your Honor.

17 THE COURT: Mr. Pritikin, anything more?

18 MR. PRITIKIN: Nothing further, your Honor.

19 THE COURT: Let me confirm that I have removed, 1, 4,
20 5, 6, 11, 18, 20, 22, 25, 27, 30, 35 and 37. Anyone disagree
21 with that?

22 MS. SULLIVAN: That's correct, your Honor. Is 38
23 still pending, that's the retired husband, or did you rule?

24 THE COURT: He is on for the time being.

25 MS. SULLIVAN: We have several others to raise per

1 your invitation about hardship.

2 THE COURT: When you finish, let's be finished.
3 Let's not just keep going through these. What is your
4 hardship?

5 MS. SULLIVAN: On hardship, I didn't think we got to
6 that category.

7 THE COURT: We are done --

8 MS. SULLIVAN: We just have one more, Juror Number
9 28. Juror Number 28 said, I have just obtained a care-giving
10 position to begin Wednesday, a woman with hip surgery whose
11 husband had a stroke.

12 THE COURT: Did they ever say anything in the course
13 of -- I don't remember her ever speaking up. If that's the
14 case, I would be inclined to remove 28 also. Any objection?

15 MR. PRITIKIN: No, sir.

16 MS. SULLIVAN: Thank you, your Honor. We are done.

17 THE COURT: Counsel, Casey will start with the
18 plaintiff, we will do one number, it goes to the defense, it
19 does one number, goes back to the plaintiff for the second.
20 If at any point you have exhausted who you want to perempt,
21 draw a line through the rest of the spots, sign it and give
22 it back to Casey. I do not employ the rule, although I'm not
23 sure where it comes from, if you have perempted 15 you can
24 never go back to anyone before 15. It is free go.

25 They will be back in five minutes. In the meantime you

1 all can go talk, and I will probably come out around 11:25.
2 (Break.)

3 THE COURT: Ladies and gentlemen, what is happening
4 currently is what I was telling you about: At the end we
5 have what we call for-cause challenges, which are people who
6 have reasons for which they have indicated they can't be fair
7 or they have vacation plans. Those are excused. And then
8 the parties are given three peremptory challenges each.
9 Those are exercised by the piece of paper that is being
10 passed back and forth. And takes us a little bit of time to
11 do that. Once we do that, we will get the actual jury
12 seated, and we will excuse everyone else.

13 When we do that, you will find us blockading the door to
14 collect all of the numbers. You are in federal court. I
15 have lifetime tenure, unless I commit high crimes or treason.
16 However, they only give me one set of numbers. We are very
17 careful to get them back each time. Please introduce
18 yourself to your neighbor and make yourself comfortable and
19 we will get on as soon as we finish the peremptory challenge
20 part.

21 JUROR NO. 15: I apologize. It occurred to me, since
22 you were talking earlier, as far as timing and things like
23 that, on September 4th I do have a commitment with my job.
24 It is really important. I am the only one that is doing --
25 I work in biotech, and this is an experiment that is set up

1 over a couple of weeks. And I am helping somebody finish it
2 off on that day.

3 THE COURT: Is there anyone else that would be able
4 to do that, sir?

5 JUROR NO. 15: I really don't know at this time. I
6 don't know exactly what the situation is. This is
7 something -- I apologize.

8 THE COURT: I will see one lawyer from each side at
9 sidebar, please.

10 (Sidebar out of the hearing of the jury.)

11 THE COURT: What do we do with Mr. 15 here? The 4th
12 is dead-on. It is a trial day.

13 MR. PRITIKIN: I know. It will be a conflict that
14 day. We would leave it to your discretion, your Honor.

15 MS. SULLIVAN: We have no objection to excusing him.

16 THE COURT: I will excuse him. It makes you wonder,
17 you have asked these questions over and over again. 15 will
18 be excused then.

19 (End of sidebar.)

20 THE COURT: Ladies and gentlemen, the following have
21 been selected to serve as the jurors in this matter. Please
22 let me finish reading the list of all eight of you, and then
23 the rest of you are free to gather up your stuff and depart,
24 knowing that we have that back door blockaded until we
25 collect the numbers. For the eight of you who are serving,

1 you can just stay seated and we'll get you moved up here
2 where you need to be in the jury box.

3 The last thing I will say is, don't try and figure out why
4 you were or weren't selected for the jury. I love to tell
5 the story of the man who I started work with, who very
6 carefully told me, never, under any circumstances, put
7 someone with tinted glasses on the jury. In later age he got
8 tinted glasses. This is some science, some art, and some
9 just what your stomach tells you. Don't think somehow that
10 you were not selected because of something you said or --
11 Perhaps it was because of something you said, because I
12 removed several people who said they couldn't be fair or who
13 said they had plans and wouldn't be available for the full
14 trial.

15 Ladies and gentlemen, the following jurors have been
16 selected as the jury in this matter: Number 2, Number 3,
17 Number 9, Number 10, Number 12, Number 13, Number 14, and
18 Number 23.

19 To the rest of you, thank you very much for coming in. I
20 know this is not your favorite thing to do, but please go
21 home and tell all your friends, having gone through voir dire
22 at least in this courtroom, it was an entertaining morning.
23 Thank you very much. And you are excused.

24 Please be seated, ladies and gentlemen. Mr. Harrigan,
25 does Microsoft accept the jury as constituted?

1 MR. HARRIGAN: Yes, your Honor.

2 THE COURT: And I'm not sure -- Ms. Sullivan, does
3 Motorola accept the jury as constituted?

4 MS. SULLIVAN: Yes, your Honor.

5 THE COURT: All right. Ladies and gentlemen, let me
6 tell you what we are going to do, other than let you go to
7 lunch: Which is, I am not going to swear you in. We will
8 leave you unsworn until you come back. When you come back we
9 will have you swear another short oath saying you will be
10 good jurors.

11 Let me talk with you, though, in the meantime about just a
12 couple of practical details. The first of which is,
13 everything that you need to know about this case you are
14 going to learn here in the courtroom. We have rules about
15 what is received into evidence and what is not. There is a
16 lot of other stuff out there. There was a lot of comment at
17 one point about this case among a very narrow slice of the
18 population. But you can find it easily enough on the
19 internet if you wanted to. You can't. The reason is that
20 some of that is just completely wrong, some of it is not
21 based on any facts, some of it is just opinions. We can't
22 have you exposed to that. We want to you hear what is heard
23 here, because it has been vetted, and, most importantly, also
24 all of you are going to hear it at the same time so you can
25 have the same body of knowledge to deal with. Secondly, both

1 sides will know what you have heard, and they will have a
2 chance to ask questions of the witnesses to produce that
3 material. You will hear me say over and over again, please
4 don't consult the internet. I know it is so tempting. I
5 know some of you undoubtedly want to have your own blog: I
6 was a juror in this trial. And you are welcome to do that,
7 but not until it is over with. Otherwise, counsel would know
8 way too much about the jury deliberations, which are your
9 matter and no one else's.

10 Finally, from time to time there may be news accounts
11 about this trial. If there are, please don't read them.
12 Don't let anyone talk to you about the case. When you go
13 home tonight they are going to say: What is the case about?
14 The answer is going to be: I can't talk to you about what it
15 is about. You are free to advise your employers that you are
16 on jury duty. If they have any questions about that, I will
17 be happy to give them a call and explain to them you are
18 doing something that is extremely important, and they need to
19 pay you.

20 Finally, because of the configurations in this courthouse,
21 you are going to be riding the public elevator. You have a
22 badge on that says juror. These are nice people. They are
23 not going to do anything other than be in the elevator, but
24 they will pretend you are not there. And the reason they are
25 pretending you are not there is, if they say something to you

1 as innocent as good morning, and someone else sees it, they
2 don't know whether it was good morning. It could have been,
3 vote my way, or, boy, isn't that other side terrible? The
4 lawyers and the witnesses are under instructions never to
5 talk to you. It is not that they are being rude, it is just
6 the fact that we need to do that in order to make sure that
7 you don't receive anything improper.

8 If someone does try to talk to you about the case, let me
9 know about it immediately. We have had that happen once. It
10 was a client representative who was trying to pick up a juror
11 to go on a date. He was very surprised when the date turned
12 out to be three United States marshals who took him down to
13 the jail on the tenth floor. We finally got it sorted out
14 after he spent four hours in a cell. There is a good reason
15 for folks not to do that.

16 Other than that, there are lots of places to go to lunch.
17 I am going to release you. I would like you back here about
18 1:20, 1:25. We can't start without all of you being here.
19 So not only will I be unhappy with you, but your seven other
20 jurors will be unhappy with you.

21 There is lots of restaurants in this area, and they are
22 pretty used to having people get in and out promptly.

23 The clerk will take you back and show you your luxurious
24 quarters, with your dynamic view of the skyline, and the
25 56-inch television we have back there. If you believe any of

1 that, I also have the Brooklyn Bridge for sale.

2 Other than that, I will see you shortly when you come
3 back. I will have you sworn in. I am going to read you some
4 very long jury instructions, that are kind of like the
5 operating manual for how to be a juror. One of those
6 instructions is much longer than usual, and it is an outline
7 of the case. I do that because, with the assistance of the
8 lawyers, this is an unusual case and we want you to know a
9 bit more about it so that you understand the context of the
10 testimony you are about to hear. That will probably take
11 about 20, 25 minutes, and then we are going to go directly
12 into opening statements.

13 For those of you who watch a lot of television and watch
14 any of those crime and courtroom shows, they don't touch
15 reality in the slightest. I can promise you that I will
16 never say, "Dial it back, Mr. McCoy," or have someone ask a
17 question and then when it is objected to, say, withdrawn, and
18 turn dismissively. If they did that they would be on their
19 way out of here.

20 An opening statement is a statement. It is what the
21 parties intend to prove during the trial. The part where
22 they all wave their arms and argue, that is closing argument.
23 Notice the difference between a statement and an argument.
24 And that will happen next week.

25 So look forward to opening statement. It will be

1 interesting. These are very talented lawyers. They have
2 important questions for their clients, and so they are going
3 to do a very good job. I will promise you when you are here
4 we will use your time wisely. That is our deal with you.

5 Yes, ma'am.

6 JUROR: May we take notes?

7 THE COURT: You may take notes. One of those
8 operating instructions will say that. I will give you a copy
9 of the jury instructions to follow along with me, because
10 studies suggest if you are reading and listening at the same
11 time you will pay closer attention. I am then going to take
12 those back, because at the end of the trial I will give you
13 the final instructions. Those will be the ones that control
14 your deliberations. In the meantime, I want to give you
15 every advantage I can in order to help you understand the
16 evidence and help you keep track of it.

17 I have been asked on occasion whether you can keep your
18 notes on your computer. I would prefer you not do that. We
19 are going to give you something that I grew up with, which is
20 a steno pad. I think we are using pens, and not pencils at
21 this point, but who knows. It may be a rather antique
22 process, but it seems to work pretty well.

23 Your notes stay in the jury room. No one else ever sees
24 them. At the end of the trial they are destroyed, so you can
25 be as candid as you want to be in terms of writing things

1 down. They are exclusively for your use.

2 Ladies and gentlemen, please rise for the jury. We will
3 see you all around 1:25, and you will be out here at 1:30.
4 (At this time the jury left the courtroom.)

5 THE COURT: I am advised by my in-court clerk that we
6 are now all one degree of separation closer to Helen Hunt,
7 because apparently Helen Hunt played Juror 23 in some movie.

8 Mr. Harrigan, anything else before we break for lunch?

9 MR. HARRIGAN: Yes, your Honor. We have a question.
10 The court has said that the conclusions of law are free to be
11 used. We are uncertain whether that applies to conclusions
12 of law that the court has reached in the course of making
13 various rulings in this case. And I am coming back to my
14 favorite subject of whether blatantly unreasonable offers are
15 a breach of the duty of good faith and fair dealing. And I
16 can cite to the court the rulings the court has made on that
17 point, which is basically at Docket 335. The court said,
18 "Although initial offers don't need to be on RAND terms, that
19 does not mean that Motorola, as the owner of
20 standards-essential patents subject to RAND licensing
21 agreements with the IEEE and ITU, may make blatantly
22 unreasonable offers to implementers." And went on to say,
23 "Thus, although the language of Motorola's agreements do not
24 require it to make offers on RAND terms, any offer by
25 Motorola, be it an initial offer or an offer during a

1 back-and-forth negotiation, must comport --"

2 THE COURT: Mr. Harrigan, you are not speaking
3 distinctly. Why don't we try the podium? If you are going
4 to read, you need to go slowly.

5 MR. HARRIGAN: "Whether an initial offer or an offer
6 during a back-and-forth negotiation must comport with the
7 implied duty of good faith and fair dealing inherent in every
8 contract." And went on to hold, "To determine whether
9 Motorola's offers were so blatant that the fact finder would
10 need to compare Motorola's offers against a RAND royalty in
11 order," quote, "to determine whether Motorola's offers were
12 so blatantly unreasonable as to breach its duty of good
13 faith," unquote.

14 So we believe that those rulings say that the good-faith
15 determination can be made based upon whether an offer is so
16 blatantly unreasonable as to reach that level of a breach of
17 the covenant. We would like to be able to say that to the
18 jury in opening statement, but we don't know if the court
19 considers that a conclusion of law, number one, or whether it
20 is going to be in instructions at the end of the case.
21 That's our question.

22 THE COURT: It is a mixed finding of fact and
23 conclusion of law, because it is hard to keep the two
24 distinct. I can tell you that in what is proposed to you all
25 as Instruction 19 in the final jury instructions, it says,

1 after some introduction, "Initial offers in a RAND licensing
2 negotiation do not need to be on RAND terms; two, any offer
3 by Motorola, be it an initial offer or an offering during a
4 back-and-forth negotiation must comport with the duty of good
5 faith and fair dealing as set forth in Instruction 19."

6 Those numbers are going to change because we are still
7 putting things in and pulling them out. And "Number 3, in
8 determining whether Motorola's October offer letters complied
9 with Motorola's duty of good faith and fair dealing, you may
10 compare Motorola's offers against the RAND royalty rate and
11 range determined by the court, and set forth in Instruction
12 20. However, the size of an offer alone is not dispositive
13 of whether Motorola has breached the duty of good faith and
14 fair dealing." I believe we have interlineated the words "is
15 not exclusively dispositive." "Of whether Motorola has
16 breached its duty of good faith and fair dealing. To
17 determine whether Motorola's offer breached its duty of good
18 faith and fair dealing you must use the standards set forth
19 in Instruction 19," which is what I have just read to you.
20 That's the answer to your question.

21 We hope to get you these soon. As you can see, the
22 post-its are getting fewer. Does that answer your question,
23 Mr. Harrigan?

24 MR. HARRIGAN: Yes, your Honor.

25 THE COURT: Anything further?

1 MR. HARRIGAN: Not here, your Honor.

2 THE COURT: Mr. Sullivan? Mr. Cannon?

3 MS. SULLIVAN: Mr. Cannon has one item.

4 MR. CANNON: A question. One of the witnesses that
5 could potentially testify today, Mr. Treadwell from
6 Microsoft, we had a couple of objections. We knew it was an
7 unusual morning, so I don't know when you might like to take
8 those up.

9 THE COURT: "Objections" meaning?

10 MR. CANNON: To the two demonstratives. We have an
11 objection to the two demonstratives.

12 THE COURT: I will see you about 1:25. It would be
13 helpful if the demonstratives either be on the screen or you
14 have them here. We will be in recess. Counsel, thank you.

15 This was an interesting morning. I really do want to
16 stress, particularly to the audience, this was an unusually
17 educated jury pool for us. That's good.

18 I believe we are giving you copies of the preliminary
19 instructions at this time if anyone wants to collect them for
20 the parties. We will be in recess.

21 (The proceedings recessed.)

22

23

24

25

1 AFTERNOON SESSION

2 THE COURT: Counsel, I understand you don't need to
3 talk about the Treadwell exhibits.

4 MR. CANNON: Correct, Your Honor.

5 THE COURT: Are there questions, then, before we
6 bring the jury in? Mr. Harrigan?

7 MR. HARRIGAN: Not here, Your Honor.

8 THE COURT: Mr. Palumbo, Mr. Price?

9 MR. PRICE: No, Your Honor.

10 THE COURT: All right. I intend to distribute, as I
11 indicated this morning, the preliminary copies of the
12 preliminary jury instructions, one for each juror. We will
13 collect those at the end of opening statements. They're not
14 going to stay with the jury during the entire time. I was
15 persuaded by the parties' comments in our telephone
16 conference.

17 It occurred to me that in order to make your comments more
18 understandable for the jury, I was also going to give them a
19 copy of the glossary, because some of the terms that are
20 defined in the preliminary instructions pick up things like
21 SEP, as opposed to standards-essential patent every time.
22 And I tend to leave those with the jurors so they have those
23 during the course of trial. Those have been agreed to by
24 both parties.

25 I believe we're ready to bring the jury in.

1 Mr. Harrigan, does Microsoft have its first witness ready
2 for after opening?

3 MR. HARRIGAN: Yes, Your Honor.

4 (The following occurred in the presence of the jury.)

5 THE COURT: Ladies and gentlemen, as I indicated,
6 we're going to read you some preliminary instructions. Think
7 of it a bit like the operating instructions for your
8 television set. They're designed to help you figure out
9 what's going on.

10 No. 2 is not one of those. No. 2 is a fairly lengthy
11 discussion of the case to give you some factual context.

12 In addition, each of you are receiving a glossary. As you
13 will find out during the course of this trial, there are some
14 terms that we throw around a lot, in which you're going to
15 wonder what in heaven's name are we talking about. And I
16 will tell you that one that I noticed that we were using
17 ahead of time was SEP. SEP, which you will see, stands for
18 standards-essential patent. After I finish reading all of
19 these instructions to you, you'll understand perfectly what
20 that means and how it fits into the case. But this is yours
21 to hold onto and keep with your notebook.

22 Once I finish reading these instructions, then we will
23 have the opening statement by Microsoft, followed by the
24 opening statement by Motorola. And then Microsoft will be
25 calling its first witness.

1 The other thing I remind you is the difference between an
2 opening statement and a closing argument. So don't have your
3 expectations too high to see any fireworks. And at this time
4 I'm going to ask the clerk to swear you all in as jurors.

5 (The jury panel was sworn.)

6 THE COURT: Ladies and gentlemen, when I have
7 occasion these days to fly across country -- I do it a lot
8 less than when I was a lawyer in private practice -- I always
9 buy a really cheap Elmore Leonard novel, and then turn to the
10 last page to find out who did it. I'm going to ask you not
11 to do that. Studies show that if we read you something and
12 you have it in front of you and can follow along, your
13 retention of that material is quite a bit higher. So I would
14 ask that you not flip ahead to see "who did it" but follow
15 along with me as I read these.

16 No. 1. Duty of the jury. Ladies and gentlemen, you are
17 now the jury in this case. It is my duty to instruct you on
18 the law. You must not infer from these instructions, or from
19 anything I may say or do, as indicating that I have an
20 opinion regarding the evidence or what your verdict should
21 be. It is your duty to find the facts from all the evidence
22 in the case. To those facts you will apply the law as I give
23 it to you. You must follow the law as I give it to you,
24 whether you agree with it or not. You are not to be
25 influenced by any personal likes or dislikes, opinions,

1 prejudices or sympathy. That means you must decide the case
2 solely on the evidence before you. You will recall that you
3 took an oath to do so. In following my instructions, you
4 must follow all of them, and not single out some and ignore
5 others; they are all equally important.

6 No. 2. This is the one I've talked to you about now a
7 couple of times. This is a more expanded version than what
8 we normally give. The reason is that I've already conducted
9 one phase of this proceeding. And so, as they say on the
10 television, "This is what happened in the first season," and
11 now you get to be the second.

12 No. 2. This case is being conducted in two phases. This
13 is the second phase. The first phase was what was called a
14 bench trial. In a bench trial there is no jury, only a judge
15 (in this case me) who listens to evidence presented by the
16 parties and makes certain factual findings and legal rulings.
17 You must follow the legal rulings I made in that trial, and
18 accept as true the facts that I found. In this preliminary
19 instruction, I will inform you of some of these earlier
20 rulings.

21 Moreover, witnesses and counsel may refer to these earlier
22 rulings from time to time during the trial. Importantly, in
23 the prior trial I did not examine the issues that are before
24 you in this phase of the trial. The issues before you are
25 for you and you alone to decide based on the evidence you

1 will hear.

2 I will start with a general overview of this case. This
3 is a breach of contract case between Microsoft Corporation,
4 the plaintiff, and the defendant, Motorola Inc., Motorola
5 Mobility Inc., and General Instrument Corporation. I will
6 refer to all of these defendants as Motorola.

7 Motorola and Microsoft participate in international
8 organizations that set technical standards called
9 standard-setting organizations. You'll see on your glossary
10 for standard-setting organizations they sometimes are called
11 standard-developing organizations, or standard-setting
12 organizations. These are organizations that develop and
13 adopt standards. So you may hear from time to time them
14 being called SDOs or SSOs.

15 Standard-setting organizations define standard ways of
16 performing certain functions so that different products can
17 interact or interoperate with each other. These
18 organizations bring together scientists and engineers from
19 leading companies to share technologies to improve technology
20 standards. Companies that participate in standard setting
21 organizations agree on common technologies so that products
22 comply with the standards and work together. The agreed
23 standards are published and shared with the industry. The
24 standard-setting organizations hope to achieve widespread
25 industry adoption of the agreed standards.

1 There are many standard-setting organizations and many
2 technology standards. This case concerns two standard
3 setting organizations and two technical standards. The first
4 one is called Institute of Electrical and Electronic
5 Engineers. It is call the IEEE for short. The IEEE defines
6 a standard for wireless communications as the "802.11
7 standard," which you might be familiar with as WiFi. The
8 second organization is the International Telecommunication
9 Union called the ITU. The ITU defines a standard for video
10 coding technology called the H.264 standard.

11 Some of the technology in these standards is not patented,
12 and therefore available for public use. However, each of
13 these standards includes some technology that is covered by
14 patents. The patents that are used or infringed when
15 products are built to comply with a standard are sometimes
16 called standards-essential patents. Once again, if you look
17 at your glossary you would see SEP, standards-essential
18 patent. That's a term you'll hear thrown around by us all
19 the time.

20 Standard-setting organizations want companies and
21 consumers to adopt the agreed standards. To encourage
22 widespread adoption, these organizations seek contractual
23 commitments from the owners of the standards-essential
24 patents. Based on these commitments, the owners of the
25 standards-essential patents are contractually required to

1 license those patents to anyone that wants to use the
2 standard on what are called RAND, or RAND terms. The term
3 RAND stands for reasonable and non-discriminatory.

4 Motorola owns patents that are essential to the 802.11 and
5 the H.264 standards and Motorola has committed to the IEEE
6 and the ITU to grant licenses on RAND -- again, reasonable
7 and non-discriminatory -- to anyone and everyone who wants to
8 use the standards. The court has determined that Motorola's
9 commitments to the IEEE and the ITU are enforceable
10 contracts, and Microsoft, as a user of the 802.11 and H.264
11 standards, is entitled to enforce these contracts in court.
12 Microsoft claims that Motorola breached these contracts. The
13 following are some of the facts that relate to Microsoft's
14 claims.

15 On October 21, 2010, Motorola sent Microsoft a letter
16 seeking royalty payments in exchange for a license to
17 Motorola's 802.11 standards-essential patent. On October 29,
18 2010, Motorola sent a similar letter seeking royalty payments
19 in exchange for a license to its H.264 standard essential
20 patents.

21 On November 9, 2010, Microsoft filed this lawsuit against
22 Motorola, asserting, among other things, that Motorola
23 breached its contracts with the IEEE and the ITU by the terms
24 contained in these letters. After this case was filed,
25 Motorola filed patent infringement lawsuits against Microsoft

1 for using Motorola's standard essential patents. In those
2 lawsuits Motorola sought injunctions. An injunction is an
3 order from a court that requires someone to stop doing
4 something. Motorola was seeking injunctions that would stop
5 Microsoft from selling products that use either the 802.11 or
6 H.264 standard, including Windows and Xbox.

7 The issue in this case is breach of contract. Microsoft
8 claims that Motorola breached the IEEE and ITU contracts by
9 violating the covenant of good faith and fair dealing that is
10 implied in these contracts. Specifically, Microsoft alleges
11 that Motorola breached the IEEE contract by the following
12 actions: By the terms contained in the October 21, 2010
13 letter offering to license Motorola's 802.11 standard
14 essential patents; seeking injunctive relief in lawsuits
15 based on standard essential patents; and not executing a
16 license agreement covering its 802.11 standard essential
17 patents with a company called Marvell, Microsoft's WiFi chip
18 supplier.

19 Similarly, Microsoft alleges that Motorola breached the
20 ITU contract by the following actions: By the terms
21 contained in the October 29, 2010 letter offering to license
22 Motorola's H.264 standards-essential patent, and seeking
23 injunctive relief in lawsuits based on standards-essential
24 patents. Microsoft has the burden of proving these claims.

25 Motorola denies that any of its conduct constituted a

1 breach of its RAND commitments and denies that it violated
2 any duty of good faith and fair dealing implied in its
3 contract with the IEEE and the ITU. Motorola also denies
4 that any of its conduct in this case caused Microsoft
5 damages. Motorola contends that Microsoft has not taken
6 reasonable steps to mitigate any damages that it may have
7 suffered.

8 Having given you this general overview, I will now provide
9 you with additional detail on some of the concepts that are
10 important in this case. The owner of a patent that is not a
11 standards-essential patent may grant licenses to other
12 companies permitting them to sell products that include the
13 patent owner's patented technology. Such licenses may
14 require payment of a licensing fee, which is sometimes called
15 a royalty payment. If the patent is not a
16 standards-essential patent, then the owner of the patent can
17 charge as much as it wants for the license. If the price is
18 too high, the other companies can just walk away and not use
19 the patents.

20 There are different rules regarding standards and
21 standards-essential patents. When a standard becomes widely
22 implemented or adopted, the owner of a standards-essential
23 patent could have substantial leverage to demand excessive
24 royalties. Indeed, there may have been alternatives to the
25 patented technology available when the standard was agreed

1 to, but after the standard is widely adopted by the industry,
2 switching to those alternatives is either no longer viable or
3 would be too expensive.

4 The ability of an owner of a standards-essential patent to
5 demand more than the value of its patented technology and
6 attempt to capture that value that comes from being the
7 standard is called "hold-up." Hold-up can undermine the
8 standard-setting process and threaten the adoption of
9 valuable standards.

10 Another issue with standards and standards-essential
11 patents is called royalty stacking, which occurs when many
12 different holders of standards-essential patents seeks
13 excessive royalty payments for a given standard. If there
14 are a large number of owners of standards-essential patents
15 for a given standard, the total royalty payments might make
16 the product too expensive to make and sell and undermine the
17 standard.

18 Complex industry standards like H.264 and 802.11 can
19 require the use of hundreds or thousands of
20 standards-essential patents held by dozens of patent holders.
21 Stacking concerns arise if the total "stack" of royalty
22 payments would make the use of the standard too expensive and
23 the standard would potentially fail in the market. Royalty
24 stacking can be an even bigger problem for products that must
25 comply with multiple standards. The RAND commitment seeks to

1 prevent royalty stacking and ensures that the aggregate
2 royalties associated with a given standard are reasonable.

3 To address the problems of hold-up and stacking, many
4 standard-setting organizations, including the IEEE and the
5 ITU, have adopted rules relating to the licensing of
6 essential patents. Their policies require or encourage
7 companies participating in the standard-setting process to
8 agree to license their standards-essential patents on
9 reasonable and non-discriminatory or RAND terms to anyone who
10 requests a license. These agreements are contracts called
11 RAND commitments.

12 The purpose of these contracts is to encourage widespread
13 adoption of the standard and prevent hold-up and royalty
14 stacking. RAND commitments address the hold-up problem
15 because a RAND commitment limits a patent holder to a
16 reasonable royalty on the economic value of its patented
17 technology alone, not any value of the standard. RAND
18 commitments address the stacking problem by ensuring that the
19 total royalties for all standards-essential patents within
20 any standard are reasonable and non-discriminatory.

21 As I mentioned earlier, this case involves two standards
22 called 802.11 and H.264. The 802.11 standard is a wireless
23 communication standard developed over many years by the IEEE,
24 and you may know it by its more common name of "WiFi." The
25 H.264 standard is a video coding compression standard.

1 Popular examples of technologies that use the H.264 video
2 compression standard include Blu-ray movies and YouTube
3 videos. Two different standard-setting organizations were
4 involved in developing the H.264 standard, but for
5 simplicity, I will refer to H.264's standard-setting
6 organizations as just ITU.

7 The 802.11 standard allows companies to build products for
8 wireless local area networking of computers and other
9 electronic devices. If you have a home WiFi network, a
10 computer chip in your laptop uses the 802.11 standard to
11 connect to that network through the internet. The 802.11
12 standard is the most widely used and universally accepted
13 wireless communication standard for ordinary and consumer
14 business use.

15 Although there are many video coding standards, the H.264
16 standard developed by the ITU is currently the most widely
17 used video coding and compression format. Video coding and
18 compression is the process of transforming video into
19 compressed files that take up less space. When a consumer is
20 ready to watch a video, the video will be decoded by hardware
21 or software on the device that is being used to watch the
22 video. Such a computer decoding turns an encoded smaller
23 file back into an uncompressed video for viewing.

24 I will now explain the rules that the IEEE and the ITU
25 adopted and the RAND licensing commitments that Motorola made

1 to the IEEE and ITU. The ITU's policies require that a
2 patent essential to the H.264 standard must be accessible to
3 everyone without undue constraints. When patent owners
4 disclose they may have a patent essential to the standard,
5 the ITU will seek a licensing commitment from the patent
6 holder. The licensing commitment is often referred to as a
7 Letter of Assurance, or an LOA for short. The ITU provides
8 three options: First, the patent holder may commit to
9 license its standards-essential patents on a royalty-free
10 basis; second, the patent holder may commit to license its
11 standards-essential patents on RAND -- again, reasonable and
12 non-discriminatory -- or, third, the patent holder may
13 decline to make any licensing commitment. However, if a
14 standard essential holder declines to make to make a RAND or
15 royalty-free licensing commitment, the ITU's policy is that
16 the standard will not include any technology that might
17 depend on the patent. In other words, either the patented
18 technology must be free, or the licensing terms must be
19 reasonable and non-discriminatory; otherwise, the ITU will
20 not incorporate the technology in the standard.

21 Motorola submitted several Letters of Assurance to the ITU
22 in connection with its H.264 standards-essential patents.
23 Motorola's Letters of Assurance stated it would grant
24 licenses to an unrestricted number of applicants on a
25 worldwide, non-discriminatory basis and on reasonable terms

1 and conditioned on reciprocity. Reciprocity means if Company
2 X wanted a license on RAND terms to Motorola's H.264 patents,
3 it has to provide Motorola with a license on RAND terms to
4 any of Company X's H.264 patents.

5 Like the ITU, the IEEE has policies that encourage
6 standards-essential patent holders to make RAND commitments
7 and provide Letters of Assurance. The IEEE does not require
8 that specific patents be identified; instead, it only
9 requires that the contributing patent holder make the
10 licensing commitment for all patents that may potentially be
11 essential to the standard. Like the ITU, the IEEE
12 historically has not included technology into a standard
13 unless it obtained such a Letter of Assurance from the holder
14 of standards essential patents. Motorola submitted Letters
15 of Assurance to the IEEE and agreed to grant licenses to any
16 of its patents that are essential to the 802.11 standard on
17 RAND terms.

18 The IEEE and the ITU do not define what RAND licensing
19 terms are, but leave negotiation of such terms to the parties
20 involved.

21 The primary Microsoft products at issue in this case that
22 use the H.264 standard are Windows and Xbox. Windows is an
23 operating system for computers. Xbox is historically a video
24 game player, but now also plays video from sources on the
25 internet and can be used to play DVDs. As for the 802.11

1 standard, Xbox is the only Microsoft product at issue.

2 As I stated at the beginning, this case is being conducted
3 in two phases, and this is the second phase. In the first
4 phase I conducted a bench trial, the purpose of which was to
5 determine a RAND royalty rate and range for Motorola's
6 standards-essential patents. As I told you before, the IEEE
7 and ITU do not set RAND rates at which the parties are
8 required to license their standards-essential patents.
9 Instead, negotiations over RAND rates are left to the
10 parties.

11 Here the parties never agreed on a RAND rate to license
12 Motorola's standards-essential patents. However, in order
13 for you to properly assess Microsoft's breach of contract
14 claim, you must know what a RAND royalty rate and range would
15 be for Motorola's standards-essential patents. I will now
16 tell you what those rates are.

17 You will be provided these rates again at the end of the
18 trial. For each group of standards-essential patents, I have
19 found both a RAND rate and a RAND range. This reflects the
20 fact that more than one licensing rate could be RAND. The
21 RAND ranges are defined by an upper bound and a lower bound.
22 To determine the RAND rate and range, I assumed that
23 Microsoft and Motorola engaged in negotiations and found the
24 rate and range that the parties would have agreed to through
25 such negotiations. I found that the RAND rate for Motorola's

1 H.264 standards-essential patent portfolio is 0.555 cents per
2 unit, with the upper bound of a RAND royalty for Motorola's
3 H.264 SEP portfolio being 16.389 cents per unit and the lower
4 bound being 0.555 cents per unit. This rate and range is
5 applicable to both Microsoft Windows and Xbox products. For
6 all other Microsoft products using the H.264 standard, the
7 royalty rate is the lower bound of 0.555 cents per unit.

8 I also concluded in that previous trial that the RAND
9 royalty rate for Motorola's 802.11 standards-essential patent
10 portfolio is 3.471 cents per unit, with the upper bound being
11 19.5 cents per unit and the lower bound being 0.8 cents per
12 unit. This rate and range is applicable to Microsoft Xbox
13 products. For all other Microsoft products using the 802.11
14 standard, the royalty rate is the lower bound of 0.8 cents
15 per unit.

16 In the bench trial, I did not decide whether Motorola
17 breached its contracts with the IEEE and ITU. That is for
18 you to decide, and you alone. Throughout this trial you may
19 hear lawyers refer to the bench trial, and to the findings of
20 fact and conclusions of law that I made in that trial. You
21 must follow the legal rulings I made in that trial and accept
22 the facts that I found, but you are not to take any reference
23 to the previous trial as deciding any of the
24 breach-of-contract issues or as implying for which side your
25 verdict should be rendered. In the prior trial, I did not

1 examine whether Motorola breached its contractual commitments
2 with the IEEE and the ITU by violating the covenant of good
3 faith and fair dealing that is implied in those contracts. I
4 have not made a decision on those issues. It is for you, and
5 you alone, to determine whether Motorola breached its
6 contractual commitments based on the evidence you will hear
7 in the trial. You'll be happy to hear there won't be a quiz.

8 No. 3. When a party has the burden of proof on any claim
9 by a preponderance of the evidence, it means that you must be
10 persuaded by the evidence that the claim is more probably
11 true than not true. You should base your decision on all the
12 evidence regardless of which party presented it.

13 The evidence you are to consider in deciding what the
14 facts are consists of: The sworn testimony of any witness;
15 the exhibits which are received into evidence; and any facts
16 to which the lawyers have agreed.

17 In reaching your verdict, you may consider only the
18 testimony and exhibits received into evidence. Certain
19 things are not evidence and you may not consider them in
20 deciding what the facts are. I will list them for you:

21 Arguments and statements by lawyers are not evidence. The
22 lawyers are not witnesses. What they have said in their
23 opening statements, will say in their closing arguments and
24 at other times is intended to help you interpret the
25 evidence. But it is not evidence. If the facts as you

1 remember them differ from the way the lawyers have stated
2 them, your memory of them controls.

3 Questions and objections by lawyers are not evidence.
4 Attorneys have a duty to their clients to object when they
5 believe a question is improper under the rules of evidence.
6 You should not be influenced by the objection or by the
7 court's ruling on it.

8 Testimony that has been excluded or stricken, or that you
9 have been instructed to disregard, is not evidence and must
10 not be considered. In addition, sometimes testimony and
11 exhibits are received only for a limited purpose; when I give
12 a limiting instruction, you must follow it.

13 Anything you may have seen or heard when the court was not
14 in session is not evidence. You are to decide the case
15 solely on the evidence received at the trial.

16 Some evidence may be admitted for a limited purpose only.
17 When I instruct you that an item of evidence has been
18 admitted for a limited purpose, you must consider it only for
19 that limited purpose and for no other.

20 Evidence may be direct or circumstantial. Direct evidence
21 is direct proof of a fact, such as testimony by a witness
22 about what that witness personally saw or heard or did.
23 Circumstantial evidence is proof of one or more facts from
24 which you could find another fact. You should consider both
25 kinds of evidence. The law makes no distinction between the

1 weight to be given to either direct or circumstantial
2 evidence. It is for you to decide how much weight to give to
3 any evidence.

4 By way of example, if you wake up in the morning and see
5 the sidewalk is wet, you may have found -- you may find from
6 that fact that it rained during the night. However, other
7 evidence such as a turned-on garden hose may offer a
8 different explanation for the presence of water on the
9 sidewalk. Therefore, before you decide that a fact has been
10 proved by circumstantial evidence, you must consider all of
11 the evidence in the light of reason, experience, and common
12 sense.

13 There are rules of evidence that control what can be
14 received into evidence. When a lawyer asks a question or
15 offers an exhibit into evidence, and the lawyer on the other
16 side thinks that it is not permitted by the rules of
17 evidence, that lawyer may object. If I overrule the
18 objection, the question may be answered and the exhibit
19 received. If I sustain the objection the question cannot be
20 answered and the exhibit cannot be received. However, when I
21 sustain an objection to a question, you must ignore the
22 question and must not guess what the answer might have been.

23 Sometimes I may order that evidence be stricken from the
24 record and that you disregard or ignore the evidence. That
25 means when you are deciding the case you must not consider

1 the evidence I have told you to disregard.

2 In deciding the facts in this case you may have to decide
3 which testimony to believe and which testimony not to
4 believe. You may believe everything a witness says, or part
5 of it, or none of it. Proof of a fact does not necessarily
6 depend on the number of witnesses who testify about it.

7 In considering the testimony of any witness, you may take
8 into account the opportunity and ability of the witness to
9 see or hear or know the things testified to; the witness's
10 memory; the witness's manner while testifying; the witness's
11 interest in the outcome of the case and any bias or
12 prejudice; whether other evidence contradicted the witness's
13 testimony; the reasonableness of the witness's testimony in
14 light of all the evidence; and any other facts that bear on
15 believability. The weight of the evidence as to a fact does
16 not necessarily depend on the number of witnesses who testify
17 about it.

18 Some witnesses, because of education or experience, are
19 permitted to state opinions and the reason for those
20 opinions. Opinion testimony should be judged like any other
21 testimony. You may accept it or reject it, and give it as
22 much weight as you think it deserves, considering the
23 witness's education and experience, the reasons for the
24 opinion, and all the other evidence in the case.

25 The parties have agreed to certain facts. These facts

1 will be placed in an exhibit and read to you before closing
2 arguments. Therefore, you should treat these facts as having
3 been proved.

4 Now I will say a few words about your conduct as jurors.
5 This is going to sound familiar from before lunch. First,
6 keep an open mind throughout the trial and do not decide what
7 the verdict should be until you and your fellow jurors have
8 completed your deliberations at the end of the case.

9 Second, because you must decide this case only on the
10 evidence received in the case and my instructions on the law
11 that applies, you must not be exposed to any evidence about
12 the case or any of the issues it involves during the course
13 of your jury duty. Thus, until the end of the case or until
14 I tell you otherwise, do not communicate with anyone in any
15 way, and do not let anyone communicate with you in any way
16 about the merits of the case or anything to do with it. This
17 includes discussing the case in person, in writing, by phone
18 or other electronic means, via e-mail, text messaging, or any
19 internet chat rooms, blog, website or other feature. This
20 applies to communicating with your fellow jurors until I give
21 you the case for deliberation, and it applies to
22 communicating with everyone else, including your family
23 members, your employer, and the people involved in the trial,
24 although you may notify your family and your employer that
25 you have been seated as a juror in the case.

1 But, if you are asked or approached in any way about your
2 jury service or anything about the case, you must respond
3 that you have been ordered not to discuss the case and report
4 the contact to the court.

5 Because you will receive all the evidence and legal
6 instructions you properly may consider to return a verdict,
7 do not read, watch, or listen to any news or media accounts
8 or commentary about the case or anything to do with it. Do
9 not do any research such as consulting dictionaries,
10 searching the internet or using other reference materials,
11 and do not make any investigation or in any way try to learn
12 more about the case on your own.

13 Third, during the trial do not talk with or speak to any
14 of the parties, lawyers, or witnesses in the case. Not even
15 to pass the time of day. It is important not only that you
16 do justice in the case, but that you act accordingly. If a
17 person from one side of the lawsuit sees you talking to a
18 person from the other side, even if it's just about the
19 weather, that might raise a suspicion about your fairness.
20 So, when the lawyers, parties and witnesses do not speak to
21 you in the halls, on the elevator and the like, you must
22 understand they are not being rude. They know they are not
23 supposed to talk to you during the trial, and they are
24 following the rules.

25 The law requires these restrictions to make sure the

1 parties have a fair trial on the same evidence that each
2 party has had an opportunity to address. A juror who
3 violates these restrictions jeopardizes the fairness of the
4 proceedings, and a mistrial could result that would require
5 the entire process to start over. If any juror is exposed to
6 any outside information, please notify the court immediately.

7 During deliberations you will have to make your decision
8 based on what you recall of the evidence. You will not have
9 a transcript of the trial. I urge you to pay close attention
10 to the evidence as it is given. If at any time you cannot
11 see or hear the testimony, evidence, questions or arguments,
12 let me know so I can correct the problem.

13 If you wish, you may take notes to help you remember the
14 evidence. If you do take notes, please keep them to yourself
15 until you and your fellow jurors go to the jury room to
16 decide the case. Do not let note taking distract you. When
17 you leave, your notes should be left in the jury room. No
18 one will read your notes. They will be destroyed at the
19 conclusion of the case.

20 Whether or not you take notes, you should rely on your own
21 memory of the evidence. Notes are only to assist your
22 memory. You should not be overly influenced by your notes or
23 those of your fellow jurors.

24 From time to time during the trial it may be necessary for
25 me to talk with the attorneys out of the hearing of the jury,

1 either by having a conference at the bench when the jury is
2 present in the courtroom or by calling a recess.

3 Please understand that while you are waiting we are
4 working. The purpose of these conferences is not to keep
5 relevant information from you, but to decide how certain
6 evidence is to be treated under the rules of evidence and
7 avoid confusion and error. Of course, I will do what I can
8 to keep the number and length of these conferences to a
9 minimum. I may not always grant an attorney's request for a
10 conference. Do not consider my granting or denying a request
11 for a conference as any indication of my opinion of the case
12 or what your verdict should be.

13 And, finally, trials proceed in the following way: First,
14 each side may make an opening statement. An opening
15 statement is not evidence. It is simply an outline to help
16 you understand what the party expects the evidence will show.
17 A party is not required to make an opening statement. The
18 plaintiff will then present evidence, and counsel for the
19 defendant may cross examine. Then the defendant may present
20 evidence and counsel for the plaintiff may cross examine.

21 After the evidence has been presented I will instruct you
22 on the law that applies to the case and the attorneys will
23 make closing arguments. After that you will go to the jury
24 room to deliberate on your verdict.

25 Those are the court's preliminary instructions. At this

1 time I would ask you to give your attention to counsel for
2 Microsoft, who will make Microsoft's opening statement.
3 We'll then take a break so that you'll have an opportunity to
4 use the restroom or go back and stretch your legs. Then
5 we'll come out and we'll hear Motorola's opening statement.
6 And if we have enough time, we'll at least get our first
7 witness of the day started.

8 We take a hard stop at 4:30. For those of you who don't
9 work downtown and have made bus arrangements, you can count
10 on us being done at 4:30, so plan your bus schedules
11 accordingly. Usually we'll stop about 4:25. I have some
12 instructions about not doing internet research, and whatever,
13 that I read to you, then we talk about what time to be here
14 the next day. I don't know who will be doing this for
15 Microsoft.

16 MR. HARRIGAN: I will be doing it, Your Honor.

17 THE COURT: All right. Please give your attention to
18 Mr. Harrigan.

19 MR. HARRIGAN: Good afternoon. It's my honor to make
20 Microsoft's opening statement in this case. My colleagues,
21 Mr. Pritikin, Mr. Cederoth and Ms. Robbins, whom I introduced
22 earlier, will be, along with me, presenting some of the
23 evidence for Microsoft and questioning witnesses. But I am
24 going to provide you with the opening statement.

25 As the court said, nothing that I say in this opening

1 statement is evidence. My purpose in making the opening
2 statement is to provide a framework to tell you what
3 Microsoft is claiming in this case, and also to outline the
4 evidence that we believe will be presented during the trial
5 in support of those claims. But it will be up to you to
6 decide whether anything I predicted was going to happen
7 actually happens during the trial.

8 So, I'm going to start with an outline of Microsoft's
9 basic claim, and then get into some details of the evidence
10 that we believe supports that. This case is about an
11 important contract commitment that Motorola made, and it made
12 it before the two standards organizations that are involved
13 here would allow it to contribute to the standards, to
14 contribute its technology to the standards; that is, the RAND
15 commitment that the court has talked to you about.

16 Pardon me if I'm repeating some things that the court
17 said, but I want to put this all in context. So RAND stands
18 for reasonable and non-discriminatory. And RAND is talking
19 about royalties. It's saying if you have a patent in the
20 standard, you must provide a license to that patent on terms
21 that are both reasonable and non-discriminatory. And
22 Motorola submitted letters to these two organizations stating
23 it would do that. And only because it did so, was it allowed
24 to contribute its technology to the standards.

25 And as the court said, that commitment applies to what we

1 will fondly call SEPs, or standards-essential patents, which
2 means patents that if you are using the standard, you're
3 basically using that technology, even if it's only a tiny
4 little part of the entire standard which consists of
5 thousands of little components. But any patent that's used,
6 when you're using the standard, is called a
7 standards-essential patent.

8 The RAND commitment includes some other language, which is
9 that you must make your technology, your standards-essential
10 patents, available to anyone on reasonable terms and
11 conditions and non-discriminatory terms and conditions.

12 So if someone comes along and they say, we want to use
13 this H.264 standard, please give us a license to your part of
14 it, your patent, you must make it available to that person or
15 any other person that wants to use the standard. You must
16 make it available on reasonable terms and conditions to
17 anyone.

18 Now, the basic purpose of this RAND obligation is to
19 prevent abuse of the power of being part of the standard.
20 And the court covered some of this already. In fact, we're
21 going to review certain parts of his preliminary instructions
22 as we go through this. But the purpose -- because being in
23 the standard, once the standard is successful, gives leverage
24 that you wouldn't have had before you were in the standard.
25 And so the RAND commitment has to be made before the

1 technology goes into the standard. And it applies from that
2 point forward to protect the people who want to use the
3 standard from having to pay excessive royalties, because now
4 suddenly a patent that was included before there was a
5 standard is part of a big and valuable standard, and so there
6 would be leverage to get a higher royalty.

7 Now, Microsoft brought this action in order to require
8 Motorola to honor the RAND commitments that it made to the
9 two standards organizations, the H.264 organization and the
10 802.11 or WiFi organization.

11 Microsoft brought this action to ask the court to decide
12 what RAND was, what the royalties were that were required by
13 the RAND commitment for Motorola's patents in those two
14 standards. And that's the trial that happened in November.
15 And the court made its ruling on that issue in April of this
16 year. And the court did decide, as the court just described,
17 what those royalty amounts were, what true RAND was for
18 Motorola's patents in the two standards, and Microsoft will
19 get a license to that part of the standard on those
20 reasonable terms.

21 But the reason that we are here now is that this was
22 accomplished -- that is, this ruling, and the fact that
23 Microsoft would now get a license -- was accomplished over
24 strenuous efforts by Motorola to extract excessive royalties
25 from Microsoft and get Microsoft to agree to them before this

1 court could decide the case. And that's really the story
2 that I'll be telling you when I get up to the timeline here.

3 But let's start at the beginning. The beginning is that
4 Motorola did contribute technology to each of these
5 standards. And it was required to, and it did, enter into
6 the RAND commitment. And there are basically two reasons why
7 a company with technology in a standard can get leverage to
8 extract excessive royalties, and therefore the RAND
9 commitment is required.

10 One is that once you've put the standard into a product,
11 let's say -- you'll be hearing about this -- Microsoft
12 decides to put H.264 video compression technology into
13 Windows. Then it's distributing Windows every day. It
14 distributes millions of copies. Once it's done that, it
15 can't take it back out. And so if there weren't a commitment
16 to license on reasonable terms, when you go to the holder of,
17 let's say, one-hundredth of the patents in the standard and
18 say, "I want a license," that person could say -- well, you
19 know, it's kind of like being out in the desert and needing a
20 glass of water -- "Here's the price." And it could be
21 astronomical.

22 That's one reason why the company is stuck with having the
23 standard in its products; it needs to know before it puts
24 them in there that it's going to be able to get a reasonable
25 royalty. If it didn't have that assurance and couldn't rely

1 on it, it wouldn't put the standard into its products and the
2 standard would not be successful. So that's one reason.

3 The other reason is, the other reason why a RAND
4 commitment is necessary, is that once a standard does become
5 successful, like WiFi, consumers expect it. And so even if a
6 company hasn't put it into its products, it feels now it
7 needs to do that. And so it's also to protect the standard
8 process from its own success, to protect companies that want
9 to put the standard in from having to pay excessive
10 royalties. So those are the two basic purposes of RAND.

11 And a point here that's important, and it will be very
12 important in this case, is that one patent -- in these
13 standards there are thousands of individual pieces of
14 technology, and many of them are patented. You need a
15 license to the whole standard, which means that you need a
16 license from each holder of one or more of those patents.
17 And so it means that one -- the holder of one patent out of a
18 couple of thousand could insist upon an astronomical royalty,
19 but for the RAND commitment. So that's kind of the situation
20 that we're in. And insisting upon an excessive royalty is
21 commonly, in this standards business, called hold-up, for
22 obvious reasons.

23 Now, an important fact in this case that will not be
24 disputed relating to Motorola's patents is that in both the
25 case of H.264 and 802.11, Motorola's patents are a sliver --

1 and that word is used, and this will not be disputed -- is a
2 sliver of the overall technology. And to put it in
3 perspective, for WiFi, 92 companies contributed patents to
4 that standard. And Motorola, therefore, starts out being
5 1/92nd, if they were all the same. But it is undisputed
6 that, in fact, Motorola is a sliver of that standard, and the
7 same is true of the H.264 standard.

8 And the evidence in this case will be that -- we believe
9 will be that instead of making its technology available for
10 reasonable and non-discriminatory terms, Motorola demanded
11 excessive, very excessive royalties. Then, and this is what
12 occurred in October of 2010, then when Microsoft did not
13 agree to pay those amounts, Motorola launched a campaign
14 seeking injunctive relief, literally, against all sales of
15 Xbox and Windows over a large part of the globe through a
16 series of lawsuits, that we'll get into in a minute.

17 And Microsoft contends that the purpose of its doing so
18 was to threaten Microsoft with the enormous damage that would
19 occur from having all of its distribution of its most
20 valuable products interrupted by an injunction from some
21 court -- and I'll tell you which courts in a minute -- to
22 threaten Microsoft with that huge damage in order to get it
23 to agree to an excessive royalty before this court could
24 decide the case and Microsoft get a license on RAND terms.

25 Now, the beginning of this effort was in October of 2010

1 when Motorola sent two letters to Microsoft, which we'll get
2 into in more detail in a minute, demanding royalties that
3 were extremely excessive. This is not just an argument I'm
4 making, because the court has told us what the actual RAND
5 royalties should be. And, in fact, what Motorola is
6 demanding in those letters was thousands of times higher than
7 the amounts that the court found were, in fact, reasonable.

8 Why did Motorola do this? It did it so that it could
9 check off a box. It did it so it could say: We offered
10 Microsoft a license. They didn't take it. Then they could
11 go to court and say: Microsoft does not have a license to
12 our sliver of these two standards, therefore the court should
13 block its sales of the products containing the two standards,
14 which included Windows and Xbox, and thus creating an
15 enormous incentive, shall we say, for Microsoft to agree to a
16 high royalty, and to do that before this court could decide
17 the case.

18 When Microsoft received these letters in October of 2010,
19 it believed that that was exactly what was coming. The
20 reason was, first of all, that the royalty amounts were
21 absurdly high. And secondly, there had been conversations
22 before the letters were delivered between Microsoft's head of
23 licensing and Motorola's head of licensing in which Motorola
24 had threatened litigation.

25 So, shortly after receiving the letters, Microsoft filed

1 this lawsuit and said to this court, please determine what
2 RAND is so that we can get a license on RAND terms. And you
3 can see that that process would have given Motorola
4 everything it was entitled to. Once it played out and the
5 court decided what the correct RAND rate was, Motorola would
6 be getting the proper royalty, Microsoft would have a
7 license, and that would be that.

8 But, instead, literally the day after Microsoft filed this
9 case in November of 2010 asking for the court to set the RAND
10 rate, Motorola filed the first of its injunction actions in
11 Wisconsin, followed shortly thereafter by another injunction
12 action in the International Trade Commission. The first one
13 would have blocked Windows and Xbox sales in the United
14 States. The second would block the importation of Xbox into
15 the United States.

16 And in July of 2010, Motorola filed an action in Germany,
17 where they have a very fast procedure toward getting an
18 injunction. And that lawsuit would not only have blocked
19 sales in Germany, but because Microsoft's distribution
20 center, for a large part of the globe, was located there, it
21 would have blocked sales from that distribution center,
22 distribution of products from that center to other parts of
23 the world.

24 After the German lawsuit was filed, and with this case
25 being set for trial in November of 2012, Microsoft came back

1 to this court for help, again, and said, please stop Motorola
2 from enforcing any injunction that it gets in Germany.
3 Because the German injunction was potentially coming as early
4 as April of 2012. And so this court did, in fact, enter an
5 order stopping Motorola from enforcing any German injunction,
6 so that Microsoft would not be subject to this type of
7 pressure, and then this court could decide what the RAND rate
8 is, proper RAND rate is. And Microsoft would get a license.
9 And Motorola would get what it's entitled to.

10 So that part of the case has been accomplished. This part
11 of the case deals with the fact that Microsoft suffered
12 damages along the way. And we're here to ask you to decide
13 whether Motorola's actions were a breach of its contract and
14 thus entitling Microsoft to damages. The damages consist of
15 two components.

16 One is that while the German injunction threat was
17 looming, Microsoft realized that the only certain way that it
18 could avoid the tremendous impact of that injunction against
19 its distribution of products was to literally pick up that
20 massive distribution center and take it out of Germany. And
21 Microsoft moved it to the Netherlands in a record time of
22 four months at a cost of about \$23 million. That's one
23 component of the damages that we're seeking.

24 The other is about \$6 million in attorneys fees incurred
25 in resisting the injunction effort.

1 Now, before I get to the details of what I have just
2 described, let's revisit the subject of what are the purposes
3 behind the RAND contract. And the reason I want to do that
4 is that the breach of contract that we're really talking
5 about here is the breach of what is known as the covenant of
6 good faith and fair dealing. And that is not written into a
7 contract, but it is part of every contract. It's implied.
8 And that, the covenant of good faith and fair dealings says
9 that a contracting party will not take any action that
10 frustrates the purposes of the contract. So in order to
11 figure out whether there's a breach of the covenant of good
12 faith and fair dealing, we need to look in more detail at
13 what the purposes are of this RAND contract.

14 So let's begin with why there are standards. And I'll
15 keep this short. But WiFi is a good example. It was
16 developed by the IEEE. It's a very complex system. It has
17 thousands of technical elements. It took seven years for it
18 to be developed. Many, many companies and universities
19 participated. It was issued in 1997. After all that work,
20 the IEEE wants that standard to be successful. And so in
21 order to make that happen they have to deal with the risks
22 that I've already described, that those with patents that are
23 essential to the standard will abuse that power. And so they
24 require the RAND commitment in advance in order to avoid
25 that.

1 And I'd like now to just take a look at what the court has
2 said in its preliminary instruction in a little bit of detail
3 about this issue. You should see it up here on your screen.
4 Now this is out of the instruction.

5 THE COURT: Excuse me, Mr. Harrigan. Ladies and
6 gentlemen, is everyone's screens on? They're under the
7 control of the podium, and lawyers have been known to put
8 their elbow on them, or do other things. So, if at any point
9 you don't, start waving your hands. Go ahead, Mr. Harrigan.

10 MR. HARRIGAN: Thank you, Your Honor. So in the
11 preliminary instructions the court referred to the rules that
12 apply to standards and standards-essential patents. And
13 here, as you see, the court said, "When a standard becomes
14 widely implemented or adopted, the owner of a
15 standards-essential patent could have substantial leverage to
16 demand excessive royalties."

17 Then a little bit farther on the court says, "The ability
18 of an owner of a -- notice the word "a" --
19 standards-essential patent, to demand more than the value of
20 its patented technology and to attempt to capture value that
21 comes from the standard is called hold-up." So this is a
22 well-recognized problem, that there's leverage to demand
23 excessive royalties, and doing so is considered hold-up. And
24 doing so is also a breach of the covenant of good faith and
25 fair dealing because it frustrates the basic purpose of the

1 contract, which is to assure people who are putting the
2 standard into their products that they will not have to face
3 that risk.

4 So, in this case what we're going to ask you to do, among
5 other things, is to compare Motorola's demands that were
6 delivered in October of 2010, and continued thereafter, to
7 the RAND amounts set by the court, and decide if they were
8 for excessive royalties, whether that was the case where the
9 owner of a standards-essential patent demanded excessive
10 royalties using the power of the standard.

11 Now, one thing that is also not disputed in this case is
12 that the opening offer does not have to be a RAND offer; it
13 can be somewhat above RAND. But every offer, even the first
14 offer, has to comply with the covenant of good faith and fair
15 dealing. And that means that it can't be part of a program
16 to use the leverage of the standard to demand excessive
17 royalties, as this -- I'm not very good at underlining, I
18 crossed it out instead -- but the leverage, using a demand
19 letter for excessive royalties as part of a program to
20 extract excessive royalties would be a breach of the covenant
21 of good faith and fair dealing.

22 And we are going to show you, in this case, that Motorola
23 did just that; that these demands in October were part of an
24 overall plan, that went on for a couple of years, to extract
25 excessive royalties from Microsoft.

1 Now, let's take a look at Motorola's actual contracts. So
2 this is -- as I think the court has told you, the RAND
3 commitment comes in the form of a Letter of Assurance, which
4 is in this case written by Motorola, before the standards
5 organization will accept its patents for its technology as
6 part of the standard. Motorola said the patent holder is
7 prepared to grant a license to an unrestricted number of
8 applicants on a worldwide, non-discriminatory basis, and on
9 reasonable terms and conditions.

10 So the license is to anyone -- an unrestricted number of
11 applicants worldwide -- and it has to be on reasonable terms
12 and conditions. And Motorola assured the ITU that it would
13 do that with respect to its H.264 patents.

14 Then there was a similar commitment made to the IEEE with
15 regard to WiFi. The patent holder will grant a license under
16 reasonable rates to an unrestricted number of applicants on a
17 worldwide, non-discriminatory basis, with reasonable terms
18 and conditions. I really am bad at this. So that basically
19 is the same one.

20 In the case of the IEEE, Motorola made a second commitment
21 which actually refines what "reasonable" means, at least with
22 respect to that organization. The requirement to license at
23 nominal competitive costs was part of the RAND commitment at
24 the time that Motorola first committed to license its 802.11
25 standards-essential patents on RAND terms.

1 So, in the case of 802.11, the reasonableness requirement
2 was further defined to be nominal, competitive costs. So we
3 all know that a nominal cost is not a high cost, and it has
4 to be competitive. So that is sort of a further iteration of
5 what "reasonable" meant in the case of the WiFi standard.

6 Now, I'd like to get to the part of the case where we look
7 at Motorola's demands and compare them to the actual RAND
8 rates.

9 I'd like to start with some basic facts that directly bear
10 on this comparison. So these are facts that will not be
11 disputed in this case. First, we're going to talk about the
12 size of the standards and the relative importance of
13 Motorola's technology to those standards. The 802.11
14 standard today is immense and complex and is over nearly
15 3,000 pages long. Since 1994 approximately 92 companies have
16 identified, in Letters of Assurance, over 350 patents and 30
17 patent applications as essential.

18 This is simply depicting the 92 companies, the at least 92
19 companies that own patents that are essential to that
20 standard. It will not be disputed in this case that
21 Motorola's SEP portfolio provides only a minimal contribution
22 to the 802.11 standard. So out of all of the companies that
23 contributed technology to that standard, Motorola's portfolio
24 for a number of patents is only a minimal contribution to
25 that overall standard.

1 And, secondly, that Motorola's 11 relevant
2 standards-essential patents constitute only a sliver of the
3 overall technology incorporated into the 802.11 standard.
4 These facts will be important in considering whether Motorola
5 was seeking excessive royalties.

6 Then the court ruled, as stated here and as the court
7 already said, that the RAND royalty rate for Motorola's
8 802.11 standards-essential patent portfolio is, and for
9 simplicity I'll call it three-and-a-half cents per unit. So
10 if we're talking about WiFi going into an Xbox, every Xbox
11 Microsoft sells it has to pay Motorola three-and-a-half cents
12 for Motorola's part for the WiFi standard. Now, bear in
13 mind, that doesn't get Microsoft a license to the WiFi
14 standard; it gets Microsoft a license to the sliver of that
15 standard that Motorola owns. Okay?

16 Now, let's look at H.264. Similarly, it is a large and
17 technically-complex standard, resulting from contribution of
18 roughly 170 entities submitting over 2,300 documents. And
19 approximately 52 companies submitted Letters of Assurance to
20 the ITU committing to license their H.264 standards-essential
21 patents on RAND terms. So, again, these are the companies
22 that contributed. Motorola is one of them.

23 And just as in the case of 802.11, WiFi, it is undisputed,
24 Motorola did not provide the inventive technology to the
25 H.264 standard, but instead built on already existing

1 technology. And Motorola's H.264 portfolio only constitutes
2 a sliver of the overall technology incorporated into the
3 standard.

4 So if you go to Motorola and ask for a license to their
5 patents, you're just getting started. You've got most of the
6 rest of the standard to pay royalties to, to get a license to
7 the entire standard.

8 Now, the other factor which is important here, in addition
9 to how much of the standard does Motorola actually have, is
10 how important is that part to Microsoft's products? And
11 there are undisputed facts about that, also. So, for
12 example, with respect to Windows, Microsoft adds thousands of
13 features which typically, with each version of Windows,
14 Microsoft adds thousands of features which build on the
15 capabilities of previous releases.

16 And as you will recall, H.264 is video compression, video
17 coding and decoding, and it is undisputed that that function
18 of video coding is only a tiny part of what Windows software
19 does. And, in addition, Windows supports other video
20 compression standards besides H.264.

21 And, finally, Motorola's H.264 standards-essential patents
22 are of only minor importance to the overall functionality of
23 Microsoft's Windows products. And you'll see the same is
24 true with respect to Microsoft's Xbox products.

25 So to put it in total perspective, taking H.264, Motorola

1 is a sliver of the standard, one standard which provides
2 video compression. Video compression is only a tiny part of
3 what Windows does. And Motorola's particular patents in that
4 standard are of only minor importance to the overall
5 functionality. So this all, obviously, has a lot to do with
6 how much Microsoft should pay for the privilege of having a
7 license to this technology. And here the court ruled that
8 the correct RAND -- the true RAND royalty rate for Motorola's
9 H.264 portfolio is .555 cents, or basically a half a cent per
10 unit.

11 Now let's take this information that we just went through
12 and take a look at Motorola's demands sent to Microsoft in
13 October of 2010. This is the H.264 letter. It's not that
14 easy to read, but we're going to pull out some of the key
15 elements. So this was written on October 29th of 2010, and
16 it's about the video compression standard, H.264, the one
17 that we just reviewed, for which the court said the correct
18 RAND royalty was a half a cent per unit. And we'll get to
19 how that relates to this in a second.

20 So Motorola offers to, "License the patents on a
21 non-discriminatory basis, on reasonable terms and conditions
22 (RAND). In other words, Motorola is saying, we're giving you
23 this license, and the terms on which we're giving it to you
24 are RAND." They are RAND terms. So even though an opening
25 offer does not have to be RAND, Motorola is saying it is.

1 "Including a reasonable royalty of 2.25 percent per unit for
2 each H.264-compliant product."

3 So, we have to go a little deeper into this to figure out
4 what that means. Here is some more. "As per Motorola's
5 standard terms, the royalty is calculated based on the price
6 of the end product, e.g. each Xbox 360 product, each PC
7 laptop, each smartphone, and not on component software."

8 Now, here's what that -- it may not be immediately obvious
9 what that means, but here is what it means. "Not on
10 component software" is talking about the operating system.
11 So here's the picture. Microsoft sells operating systems; it
12 doesn't sell laptops. It sells operating systems to other
13 people who make laptops and sell them. And they put the
14 operating system into their laptop. So if Microsoft sells an
15 operating system to HP and HP sells a laptop, Motorola is
16 saying, we get 2.25 percent per unit for each PC or laptop.
17 So if it's a \$500 laptop, Motorola is getting 2.25 percent of
18 the price of the laptop. And if it is a \$1,000 laptop,
19 they're getting 2.25 percent of the \$1,000. And this is for
20 a license to Microsoft, which makes operating systems, which
21 are the same in both of those laptops.

22 Then Motorola says, "We will leave this offer open for 20
23 days. Please confirm whether Microsoft accepts the offer."
24 So at the end of 20 days if Microsoft doesn't say, "We
25 accept," the offer ends, and Motorola is in a position to

1 say, "We offered Microsoft a license, they didn't take it."
2 And then to use that and go to court and say, "They don't
3 have a license, you should enjoin the sale of their
4 products," which is what happened. And we'll get there in a
5 second.

6 But first let's look at the actual comparison between this
7 demand and the royalty the court found was reasonable. The
8 .00555 I find a little bit confusing, but that's the decimal
9 version of half a cent. There's half a cent that's the RAND
10 royalty. For a \$500 laptop the 2.25 percent is \$11.25. So
11 as you can see, we're talking about a ratio here of a couple
12 thousand times. Now, you can look at this ratio another way
13 and that is that at the half-a-cent rate that the court set
14 for RAND, based on the number of operating systems that
15 Microsoft sells every year, Motorola would get \$2 million a
16 year.

17 Based upon the average laptop price being \$500, in that
18 same year using Motorola's 2.25 percent, it would be paid
19 \$4 billion per year in royalties. \$4 billion for a sliver of
20 the H.264 standard, which is of minor importance to
21 Microsoft's products, and is one of hundreds of standards
22 that Microsoft needs to comply with in its products.

23 So what is Motorola going to say about this? Well, they
24 may say, well, Microsoft should have just made a
25 counteroffer. And, you know, some of you may have experience

1 in negotiations. And it's not unusual to start with a higher
2 number than you expect to get. And car dealers could make --
3 ask for too much money for a car. But one difference is car
4 dealers don't have a RAND obligation. There is no issue of
5 their using the power of a standard to demand excessive
6 prices. But it is not within RAND to use the power of the
7 standard to gain leverage to demand excessive royalties, as
8 the court's preliminary instruction says.

9 But beyond that, we're going to present economic
10 testimony, expert economic testimony, that Motorola's demands
11 aren't even consistent with a normal economic negotiation,
12 and that they had a different purpose from just asking for a
13 higher price than you expect to get.

14 A normal negotiation, you go to the car dealer to buy a
15 Honda worth about \$15,000. He says, I want \$20,000. Do you
16 counteroffer at \$14,000? Maybe. If he says, I want \$50,000
17 for the \$15,000 car, do you counter? Probably not. What if
18 he says, I want \$30 million for the \$15,000 Honda? That is
19 what we just looked at in terms of the ratio between the
20 right price and what Motorola was demanding in October of
21 2010.

22 Now, in the case of a car dealer who said that, you would
23 laugh and go down the street. But the point is, there is no
24 down the street here. You've got the technology in your
25 products. You've distributed millions of them. You have to

1 get a license from Motorola. It's the only game in town.
2 And they're demanding an absurd amount.

3 Let's take a look the Motorola's letter for 802.11, WiFi.
4 This was sent before the other letter on October 21, 2010.
5 And you'll see it has much the same characteristics. The
6 same rate, 2.25 percent. In this case the only product
7 that's at issue is the Xbox 360 product. This offer is also
8 open for 20 days. "Please confirm whether Microsoft accepts
9 the offer." And it also says that the offer being made is a
10 RAND offer. So let's take a look at what that translates
11 into in terms of dollars.

12 The court, as you heard, has said that the RAND royalty
13 for Motorola's 802.11, it's part of 802.11, is about
14 three-and-a-half cents. Motorola's demand based on \$199 Xbox
15 is \$4.48. But there's a more expensive version of Xbox. On
16 a \$399 version, which has Kinect in it and more memory,
17 Motorola's demand is \$8.98. But the royalty set by the court
18 doesn't change depending on the price of the product, it's
19 the same. And, of course, WiFi is a chip that goes into the
20 Xbox. And I'll get to that in a bit. But the chip costs \$3.
21 Motorola wants \$8.98 for its tiny piece of that chip, a piece
22 that the court said was worth three-and-a-half cents.

23 And, of course, WiFi is exactly the same in both versions
24 of Xbox. The difference in price has to do with memory and
25 Kinect. So there's no linkage between the amount of the

1 royalty that Motorola is seeking and any value that it
2 contributes to the product.

3 And remember the earlier slide we looked at where
4 Motorola's commitment on the 802.11 was the requirement to
5 license at nominal competitive costs, was part of the RAND
6 commitment when Motorola first committed to license its WiFi
7 standards-essential patents.

8 Now, these demands, we contend, violate the covenant of
9 good faith and fair dealing, because they were an effort to
10 extract excessive royalties by virtue of owning a tiny slice
11 of these two standards. But they also frustrate a second
12 purpose of the RAND commitment, which has to do with
13 stacking, which the court also described in the opening
14 instruction. And we're going to put that up. And that is,
15 "If there are a large number of owners of standards-essential
16 patents for a given standard, the total royalty payments
17 might make the product too expensive to make and sell."

18 And then the last line, "The RAND commitment seeks to
19 prevent royalty stacking and ensures that the aggregate
20 royalties associated with a given standard are reasonable ."

21 So, again, when we're looking at was there a breach of the
22 covenant of good faith and fair dealing, that consists of
23 actions that frustrate a purpose of the contract. And a key
24 purpose of the RAND contract is to prevent royalty stacking.
25 So let's see where Motorola's demands fit into the

1 royalty-stacking picture.

2 Just to put this in perspective, we've looked at the
3 October 2010 letters. Another fact that will not be disputed
4 in this case is that two years later, at the time of the
5 trial in November of 2012, it was still Motorola's position
6 that its WiFi portfolio was worth 2.25 percent of the net
7 selling price of Microsoft's products. So, we don't need, on
8 this issue, to focus only on those letters. They were still
9 asking for the same thing last November.

10 And on the issue of stacking, another fact that will not
11 be disputed is this: Motorola's royalty requests for its
12 802.11 SEP portfolio raises significant stacking concerns.
13 There are at least 92 entities that own 802.11
14 standards-essential patents. If each of these 92 entities
15 sought royalties similar to Motorola's request, the aggregate
16 royalty to implement the 802.11 standard, which is only one
17 feature of the Xbox product, would exceed the total product
18 price. A royalty rate that implicates such clear stacking
19 concerns cannot be a RAND royalty, because such a royalty
20 rate does not stand up to the central principle of the RAND
21 commitment, widespread adoption of the standard.

22 And the arithmetic here is interesting. The arithmetic is
23 that everybody with a sliver of this standard, of which there
24 are 92 who have patents, Motorola's is a sliver, even if it
25 were bigger than a sliver, if it was just 1/92nd, the total

1 royalty, if everybody else did the same thing, would be
2 207 percent. In other words, Microsoft would be paying two
3 times what it gets for the Xbox, in royalties, to get a
4 sliver of one standard that's not particularly important to
5 the function of the product.

6 And in the case of H.264, the difference is that there are
7 only 52 patentholders. So if everybody asked for 2.25
8 percent, it would be 117 percent of the price. And bear in
9 mind that what Motorola wanted on H.264 was not 2.25 percent
10 of the cost of Windows, but two-and-a-quarter percent of the
11 cost of laptops. So it would actually be, if everybody did
12 the same thing, the royalty would be 117 percent of the cost
13 of the laptop, which would be hundreds and hundreds of times
14 the amount Microsoft gets for the operating system.

15 So, there is a clear issue here that if Motorola's conduct
16 were duplicated by everybody else, the standard would be out
17 of business, or else the people selling the products would be
18 out of business. And, bottom line is that this is, in fact,
19 conduct that frustrates another basic purpose of a RAND
20 commitment, which is to prevent stacking.

21 Now, Motorola may say that, you know, hold-up and stacking
22 have not really been a big problem. And that is not a
23 surprising fact, because everybody else is behaving
24 themselves.

25 In fact, these standards are cooperative ventures, which

1 everybody gets together to create something quite wonderful.
2 It's very useful to consumers and others. And they agree to
3 cooperate. They put the standard together. And they all
4 agree to charge only a reasonable amount. And that's what
5 they do. And so it hasn't been a problem. But the fact that
6 everybody else is behaving is not an excuse for Motorola not
7 to honor its commitment.

8 And, in fact, the head of Microsoft standards department,
9 Dave Heiner, sent a letter in June of 2011 to the FTC, which
10 said most companies play by the rules. And Motorola might
11 try to make use of that letter here. But the fact that
12 everybody else is playing properly does not excuse Motorola
13 doing otherwise. Now, what I'd like to do is go through --
14 explain how these letters and subsequent conduct play
15 together into a campaign that Motorola pursued to extract
16 royalties.

17 The story begins with some discussions between Microsoft
18 and Motorola that took place between 2007 and 2010 dealing
19 with a license agreement between Motorola and Microsoft to
20 some Microsoft patents. And that license agreement had
21 expired in 2007. Motorola was unwilling to renew. Microsoft
22 wanted it renewed. And then in 2009 the patents in question
23 were used in an Android phone that Motorola made. And so
24 finally, after three years, Microsoft sued, on October 1st of
25 2010, for infringement of its patents. Those were not H.264

1 or 802.11 patents. And the heads of licensing of the two
2 companies had some discussions about this, Mr. Gutierrez for
3 Microsoft and Mr. Dailey from Motorola. They will both
4 testify in this case.

5 And Mr. Gutierrez will testify to a comment made by Mr.
6 Dailey in referring to Microsoft's action filed on October
7 1st relating to the expired -- to the patents under the
8 expired licensing agreement, which was, "If Microsoft wanted
9 war, Motorola had patents too, and Microsoft was going to
10 lose in the end." This was a conversation occurring in early
11 October of 2010. Mr. Gutierrez said that Microsoft would be
12 happy to pay a reasonable royalty for Motorola's patents, and
13 let us know what they are.

14 A meeting was set up for October 22, 2010 in Redmond. And
15 on the day before the meeting Motorola sent the first of the
16 two demand letters that we've looked at, the one relating to
17 WiFi. Obviously that letter dealt with standards-essential
18 patents in the WiFi standard.

19 Now, why did -- we've already looked at these letters.
20 You've seen what the royalties were compared to RAND. Why
21 did Motorola make these demands in these two letters? Why?
22 Well, one thing that relates to that is that Mr. Dailey also
23 testified that it was Motorola's normal practice not to sue
24 for injunctions against parties using its technology unless
25 they had been offered a license. So the letter was to be

1 able to say, "We offered Microsoft a license." But under the
2 RAND commitment, seeking injunctive relief without offering a
3 RAND license is a breach.

4 In other words, you have to make your technology available
5 to anyone on reasonable terms. If you write a letter making
6 it available on outrageous terms, you haven't put yourself in
7 a position to where you can go and ask for injunctive relief,
8 because you haven't made it available on RAND terms. And in
9 this case there isn't any dispute about that anymore. We
10 know what Motorola demanded, and we know what RAND is. So
11 Motorola did not -- because the court has decided it --
12 Motorola did not make a RAND offer before it proceeded to ask
13 for injunctive relief. What it did was, it made an offer so
14 that it could say it had done so.

15 And when Microsoft received these letters based upon the
16 conversation that Mr. Gutierrez had had with Mr. Dailey
17 already about threatening litigation, and based upon the
18 absurd royalties set forth in the letters, Mr. Gutierrez
19 regarded them as essentially a setup for the forthcoming
20 litigation. And he also noticed that the letter said, if you
21 don't accept, basically this offer is open for 20 days, so
22 that on day 21 Motorola could say: Expired offer. We
23 offered a license. They don't have one. And they could go
24 to court and ask for injunctive relief, which is what they
25 did.

1 Microsoft basically saw this coming and decided to protect
2 itself as best it could by coming to court here in Seattle
3 and asking this court to decide what the rate was, decide
4 what RAND is. And I'm going to put up the slide of exactly
5 what Microsoft did ask for in that complaint. Microsoft
6 asked for a judicial accounting of what constitutes a royalty
7 rate in all respects, consistent with Motorola's promises for
8 -- and this is another word for WiFi -- for WiFi patents
9 identified as essential by Motorola and for H.264 patents
10 identified by Motorola.

11 In other words, we want an accounting of what we owe on a
12 true RAND basis for these two sets of patents of Motorola's.
13 And then to make sure there wasn't any question, in September
14 of 2011 in this same case, Microsoft said, "Microsoft is
15 seeking and remains ready and willing to take a license to
16 Motorola's H.264 and 802.11 declared-essential patents on
17 RAND terms."

18 So, the lawsuit that Microsoft filed was filed on
19 November 9th of 2010. The trial in this case about the RAND
20 rate took place in November of 2012. All Motorola ever had
21 to do to get a RAND royalty for its patents was let that case
22 unfold. And that's what it would have gotten. That's what
23 Microsoft asked for. And Microsoft said it would take a
24 license at whatever rate the court decided was RAND. So that
25 is why Microsoft filed the action on November 9th.

1 Now, let's take a look at what happened after that. May
2 I, Your Honor?

3 THE COURT: Yes.

4 MR. HARRIGAN: Come down here?

5 THE COURT: Yes.

6 MR. HARRIGAN: Thank you.

7 So this is the date when Microsoft sued for patent
8 infringement on the expired license agreement. Then the two
9 letters, demand letters, come in on the 21st and 29th. Then
10 Microsoft filed this action asking for a royalty accounting
11 on November the 9th. Motorola sued the next day in Wisconsin
12 to enjoin the sales of Windows and Xbox in the United States,
13 based upon its part of these two standards. Motorola then
14 sued in the International Trade Commission to block Xbox
15 imports into the United States, based on the 802.11 and H.264
16 standards, on November 22nd.

17 And then in July of 2011 Motorola sued in Germany to
18 enjoin Windows and Xbox distribution based on the H.264
19 standard. And I will cover more about this in a minute.

20 Then there was a hearing set in the German case for
21 February the 7th. It was anticipated that the German
22 injunction would be entered on April 17th. Microsoft asked
23 this court to order Motorola not to enforce any injunction
24 that it got in Germany so that the rest of this case could
25 play out and in November the court would be able to determine

1 a RAND rate and Motorola would get what it's entitled to and
2 Microsoft would pay the proper royalty.

3 And only because this court ordered Motorola not to
4 enforce this anticipated injunction in Germany was Microsoft
5 not facing disruption of its entire distribution operation
6 for Europe, the Middle East, and Africa, based upon this
7 German injunction. Because it was ordered not to enforce it,
8 that stopped that problem, and the case was able to proceed.
9 And the net result was the court decided what RAND was in
10 April of this year.

11 And with regard to the court's order barring enforcement
12 of the German injunction, it is important to note that was a
13 temporary order entered on April 12th of 2012. It was, in
14 fact, extended. But it wasn't a final order that anyone
15 could be sure would stay in place until the appeals court,
16 the Ninth Circuit, affirmed that ruling by this court at the
17 end of September of 2012. And that's because Motorola
18 appealed the court's order restraining them from enforcing
19 the German injunction. And that appeal wasn't decided until
20 the end of September of 2012.

21 Then, finally, the court did rule on the RAND royalty
22 again on April 19th of 2013.

23 THE COURT: Mr. Harrigan, watch your time.

24 MR. HARRIGAN: Yes, Your Honor.

25 Now, what will Motorola say to explain what I just

1 described? You may hear: We wanted to get our letters out
2 quickly and get negotiations started, so we just used our
3 standard rate. But they need to be careful about that,
4 because Motorola's standard rate related to cell phone
5 patents and not the two standards that are at issue here.
6 And secondly, Motorola was not seeking to negotiate toward
7 RAND when it wrote the letters; it was telling Microsoft that
8 this was a RAND rate.

9 Third, these letters were not form letters that were
10 dashed off in a hurry. And there's a key point here, which
11 is, that the letter says that, as we discussed earlier, that
12 the royalty is on each PC or laptop, not on component
13 software. That royalty setup was unique. Motorola had never
14 done that before. This was a letter that was custom-tailored
15 to Microsoft and designed to be unacceptable.

16 Motorola also was well aware that the demands that it was
17 making were far above what would be commercially reasonable
18 or nominal. We will be hearing in this case about patent
19 pools. A patent pool is a collection of companies who get
20 together who have patents in a particular standard and agree
21 upon a royalty rate that can be paid for all of the patents
22 in the pool. And that such a pool was set up for the H.264
23 standard. It's called MPEG LA. And Motorola and Microsoft
24 both participated in the discussion about what those royalty
25 rates should be. And you'll hear from Mr. Glanz from

1 Microsoft about what Motorola said at those meetings. And
2 basically the bottom line is that Motorola approved royalties
3 for the entire collection of patents in that pool that are a
4 tiny fraction of what it was demanding in October of 2010.

5 In addition, Motorola commissioned a study itself relating
6 to its WiFi portfolio, in 2003, which concluded that the
7 value of that portfolio was approximately a tenth of a
8 percent of the price of a game console, like Xbox. So
9 Motorola had an internal study that showed the royalties it
10 was seeking in October of 2010 were vastly in excess of what
11 was commercially reasonable.

12 THE COURT: Mr. Harrigan, you're running over your
13 estimate. You have ten minutes left.

14 MR. HARRIGAN: Thank you, Your Honor.

15 Now, there is one more chapter to this story that I would
16 like to visit with you. And that is that there is a company
17 called Marvell Semiconductor that makes chips that deliver
18 the WiFi function. Marvell sells them for about \$3. When
19 Microsoft was not having much luck with Motorola on getting a
20 license, it asked Marvell to request a license from Motorola
21 for Motorola's part of that chip. That is the part of WiFi
22 that belonged to Motorola that was embodied in that chip.

23 Motorola said to Marvell, we will give you a license for
24 two-and-a-quarter percent of the price of the product that
25 your chip goes into. So if it were Microsoft, that would be

1 the very same royalty that we've been looking at here, which
2 is \$11.25 for a \$500 laptop. And that would be for a chip
3 that Marvell sells for \$3. So its royalty, according to the
4 license agreement that Motorola offered, would be \$11.25 on a
5 product that Marvell sells for only \$3. And that would only
6 be for a portion of the WiFi function that's embodied in that
7 chip.

8 So that is a sort of independent corroboration of the fact
9 that Motorola was aware that its demands were excessive,
10 because Motorola is also a Marvell customer. It was well
11 aware of what the price of the chip was. And, therefore, it
12 was well aware that the royalty being demanded was very
13 excessive.

14 Now, to wrap up, we are going to present evidence along
15 the lines that I have described. The court is going to give
16 you instructions. And you're going to decide whether
17 Motorola's conduct was in breach of its contractual
18 obligations. And if you do, then Microsoft is going to ask
19 for damages. And I'll just briefly tell you what those
20 consist of.

21 The first part is the relocation of the German
22 distribution facility. That was done in order to escape what
23 would otherwise have been the devastating effects of the
24 German injunction. And Microsoft moved that facility during
25 this timeframe while the injunction -- Microsoft committed to

1 the German relocation in March of 2012, and it accomplished
2 it in a very short period of time in order to get its
3 activities out of Germany so that the impact of the German
4 injunction wouldn't apply. Because Germany can't enjoin you
5 from doing something in another country, Microsoft moved to
6 the Netherlands. And the cost of doing that and avoiding
7 much greater damage that would have occurred was \$23 million.

8 Then the second part of our damages claim is simply the
9 approximately \$6 million in legal fees that were incurred in
10 resisting Motorola's injunction efforts.

11 Thank you for your attention.

12 THE COURT: Ladies and gentlemen, I promised you an
13 afternoon break. We're going to be ten minutes long. So the
14 court clerk will be back in to get you a little bit before 20
15 after. And then between then and 4:30 you will hear the
16 opening statement made by Motorola.

17 (The following occurred outside the presence of the jury.)

18 THE COURT: We'll be in recess.

19 (The proceedings recessed.)

20 (The following occurred in the presence of the jury.)

21 THE COURT: I'd ask you at this time to give your
22 attention to Mr. Price, who will be giving the opening
23 statement on behalf of Motorola.

24 MR. PRICE: Ladies and gentlemen, good afternoon.
25 It's always hard to start after a presentation like that,

1 because even though you were told to keep an open mind until
2 you've heard all the evidence, I kind of feel like I'm
3 starting out with one foot in the grave, and one foot on a
4 banana peel. That was a pretty good presentation. But you
5 were asked to keep an open mind for a reason, and that's
6 because you need to hear about context.

7 You know, the court has decided, a couple years after 2010
8 what FRAND is, after hearing lots of evidence and experts, et
9 cetera. Now, the question though here is good faith. And
10 you remember the court told you that the court hasn't decided
11 that issue. That's your issue. And the reason that's your
12 issue is because you need to know the context. And there is
13 much, much, much more to the context than what you were told.
14 I think you will be surprised at how much more there is.

15 And when you look at that much more, when you look at what
16 the evidence really shows as to what was happening between
17 these parties, you'll see this is not a case of bad faith, a
18 bad faith violation of a RAND commitment; it is, instead, a
19 litigation tactic used in connection with Microsoft's attempt
20 to impose the Windows operating system on Motorola and on
21 others in the marketplace. And that's how this all began.

22 What the evidence is going to show is that Microsoft sued
23 Motorola twice, on October 1, 2010. And you heard that it
24 was because of something called ActiveSync? No. There were
25 nine patents asserted in that case. Only two involved that

1 technology. Most of the others involved Microsoft saying,
2 you know, this Android operating system, Motorola, that you
3 just started using, that you've committed to, when you
4 changed from Windows -- because they used to use Windows --
5 that operating system, we have patents on that, and we're
6 going to shut you down. On October 1st, 2010 Microsoft sued
7 to shut Motorola down from selling smartphones that had the
8 Android system in them. They sued them twice on that day.

9 On that same day, Microsoft said to Motorola, on the same
10 day, we want you to put your patents forward. We want to get
11 this over quickly. We want you to put your patents forward,
12 so we can all get together and discuss these issues. In
13 fact, as I will tell you in a few minutes, there was already
14 a meeting scheduled for October 22nd for the executives to
15 meet to discuss business.

16 And so Microsoft invited Motorola, said, we want you to
17 put your patents on the table. And what you're going to hear
18 is what Motorola did in this short timeframe, where they were
19 under the gun because they had just been sued, where
20 Microsoft was trying to prevent Motorola from selling its
21 phones in the U.S., that Motorola identified
22 standards-essential patents. Because of the 10,000 patents
23 Motorola had, they knew that Microsoft used WiFi. They knew
24 there was a standard. And they knew they had standard
25 patents. So they did what Microsoft asked and sent a letter

1 saying, well, here's some of the patents that we found. And
2 they put a cover letter to that. And I'll talk to you about
3 that.

4 And you'll hear what Motorola expected, which is the
5 custom and practice in the industry, which is that you then
6 talk, and that you learn about the other business, that you
7 learn what Microsoft's point of view is. And you're going to
8 hear that after Motorola sent the letter, and then a
9 subsequent letter, that Microsoft never said this violates
10 some commitment. They never said this is outrageous. They
11 never said, we're not going to respond, this is ridiculous.
12 Instead, they actually met with Motorola and said nothing.
13 And smiled. And said, put some more of your patents on the
14 table so we can all resolve this. And that's what we did.

15 And then what you're going to hear is that Microsoft then
16 sued, for putting patents on the table. And then you're
17 going to hear that what we did was then sue back. And
18 Microsoft in response didn't say, oh, we're willing to pay a
19 RAND rate on your patents. No. Instead Microsoft said, your
20 patents don't apply to us. And, in fact, your patents aren't
21 valid, and we don't owe you a penny.

22 And then you're going to learn, to show that this is just
23 litigation tactics, is that some eight months, seven months
24 after all these events in October and November of 2010,
25 Microsoft went to the Federal Trade Commission. And they

1 sent a letter -- they were making a presentation as to what
2 they thought about patent hold-up and RAND royalties, and
3 they made the representation then, after all this had
4 happened, that Microsoft had never, to that date, ever
5 accused anyone of patent hold-up. And that is because that
6 wasn't what happened in October or November of 2012.

7 So let me go into that with a little bit of detail now so
8 you can kind of see the overall picture here as to what was
9 happening. And remember you were told by Mr. Harrigan that
10 there was some contention between Microsoft and Motorola
11 before October of 2010, about some patents? Their ActiveSync
12 patents, is the name.

13 Well, actually what happened is Microsoft and Motorola
14 were business partners once upon a time. In the early 2000s,
15 Motorola made smartphones, made cell phones, smartphones, and
16 it had the capability of syncing with Microsoft's Windows,
17 for its application, so you could sync your e-mail. Kind of
18 a cool thing, right? Benefited both parties. Motorola used
19 it. Microsoft had some patents on that, and said, here's a
20 license for our help and our patents. It was four years,
21 from 2003 to 2007. And the total price for that for four
22 years was \$100,000.

23 It was in both parties' interest to be able to use this,
24 because it made our phone better, and it allowed Microsoft
25 and its product to mate with our phone. So we had that

1 business relationship. That patent expired -- I'm sorry, the
2 license expired.

3 Then there were discussions among the companies. And
4 you're going to hear Mr. Dailey, who is sitting here with us
5 at counsel table, who, from Motorola, was in charge of
6 licensing. You're going to hear Mr. Dailey talk about how
7 Microsoft and Motorola would talk every now and then. And
8 then you'll hear these almost amusing stories of Mr. Dailey
9 reaching out to Microsoft and saying, hey, let's get together
10 and talk. There was nothing contentious. There was no
11 hold-up. There was no impasse. In fact, at one point Mr.
12 Dailey even went to a conference that was being held just so
13 that he could catch up to Microsoft's general counsel and
14 say, hey, let's get together and talk about this stuff and
15 our business relationship.

16 And you're going to hear that that lead-up -- and people
17 weren't in town or whatever -- and they finally set a meeting
18 in August of 2010 to get together on that. And that was set
19 by Mr. Dailey here, and Mr. Horatio Gutierrez of Microsoft,
20 who I think I saw him a few times here, too. I took his
21 deposition and recognize him. And so that was in August of
22 2010.

23 But some things had happened in the meantime. And one of
24 the things that had happened is one of the business
25 partnerships they had was that Motorola used the Windows

1 operating systems on its phones. But then in 2008-2009,
2 Motorola decided it needed to make a change, that it wanted
3 to switch to a different operating system.

4 So we put up a timeline here. In November of 2009
5 Motorola released, finally, the Droid phone. And there was a
6 lot of publicity about that. I don't know if you guys
7 remember it. It had committed at that time, in kind of a
8 vet-the-company move, that we are going to be using and
9 committing ourselves to the Android operating system on the
10 phone, like Samsung has. Right now the world is kind of
11 divided into Android and Apple's IOS. So, Motorola wasn't
12 going to be putting anything into development for Microsoft's
13 Windows anymore. So that had been a big change, but it
14 didn't seem to raise much contention.

15 But then when that August meeting was postponed and
16 Mr. Gutierrez will tell you, I'm pretty confident, that that
17 was nobody's fault, it was just scheduling. And when I
18 predict to you what Mr. Gutierrez will say, I can predict
19 that because we've taken his sworn testimony already. And
20 he's going to take the witness stand. And so I can predict
21 to you what he's going to say, based upon his sworn
22 testimony, I think. So he's going to say it really was no
23 big deal. And they set a meeting for October 22nd. Okay.
24 This is when the general counsel, you know, the big guys can
25 get together, and Mr. Gutierrez was going to come, and Mr.

1 Dailey, and talk about business issues.

2 Now I want to take you to October 1st. It's a Friday.
3 It's always good to get bad news right before the weekend,
4 right? It's Friday. And on Friday, October 1st, without any
5 warning, without a phone call, without an e-mail, without a
6 letter, Microsoft files two lawsuits against Motorola. One
7 is here in this court, and the other is the International
8 Trade Commission. And in those lawsuits Microsoft asserts
9 not just these patents that were concerning this syncing --
10 as I said, there were about, I think, nine patents asserted,
11 and only two were those patents.

12 The majority were about Android, were about that Android
13 operating system. You know, we own part of that. And we are
14 going to try to stop you, Motorola, from selling these in the
15 United States. And then the International Trade Commission,
16 they prevent you from importing them in. So you can't even
17 bring them into the United States if they're made out of the
18 United States.

19 And you're going to hear Mr. Dailey testify that this was
20 shocking to him, because they already had this October 22nd
21 meeting set up. Microsoft had never said anything about, you
22 know, your operating system that you have committed your
23 company to is owned partly by us. He will tell you that in
24 all of his years of licensing that what happens is that
25 companies get together and they say, here is my intellectual

1 property, and I think you're using it. And the other company
2 says, that's my intellectual property, and I think you're
3 using it. And they get together and discuss things and try
4 to negotiate. And this can take months and years, actually.
5 And they try to reach an agreement so they can basically both
6 have freedom of action, which means they can both sell in the
7 marketplace. And if those break down, then you might get
8 involved in this kind of venue, in litigation.

9 But that's not what happened here. Microsoft started out
10 like that. But he didn't know why. Well, one thing that he
11 didn't know, by the way, is that Microsoft was unveiling its
12 new Windows Phone 7, its new operating system for phones,
13 just a few days later. He found that out a few days later
14 when it was, in fact, unveiled. But at the time he was sued
15 he didn't know about this.

16 But when the lawsuit took place, Mr. Gutierrez called Mr.
17 Dailey, and actually there was -- the general counsel called
18 the general counsel as well. Microsoft had a plan in place,
19 and Mr. Gutierrez will testify to this, where Microsoft would
20 call Motorola and say, we've sued you, don't worry about it,
21 please let's go forward with that October 22nd meeting. And
22 we want you to put your patents on the table so we can
23 resolve this.

24 And one thing you'll hear is that when you get involved in
25 litigation like this, that what happens usually is the other

1 side comes back with their patents. So that when you reach a
2 resolution you've got some kind of net resolution. I have
3 patents against you. You have patents against me.

4 So, Mr. Gutierrez said, we want you to come forward with
5 your patents. We want you to present those to us. Now, this
6 was the problem that Mr. Dailey faced at that time. Motorola
7 has, in the last ten years, invested about \$13 billion
8 dollars in cellular and WiFi and video -- I'm sorry,
9 cellular, WiFi, and other mobile. And about \$3 billion in
10 video. It has about 10,000 U.S. patents, just in the U.S.
11 It has 24,000 patent applications worldwide. And here
12 Microsoft has sued it and said, come back with your patents.

13 Motorola had mainly used its patents to achieve what we'll
14 hear this phrase, freedom of action. And what that means is,
15 various companies have standards-essential patents, and also
16 companies, as these smartphones got more and more
17 complicated, ended up patenting other features as well. So
18 what a company like Motorola wanted -- and a company like
19 Samsung and Ericsson and LG, who had come up with a lot of
20 the standard-essential inventions, and other inventions --
21 mainly what they wanted to get in the marketplace at that
22 time, what Motorola wanted was, freedom of action, which was
23 like a peace. We get together, we discuss all of our
24 portfolios, both SEPs and non-SEPs, and we figure out which
25 way the money flows.

1 And in doing those negotiations, Motorola had always
2 talked, really, in terms of a package. The package was
3 cellular, where Motorola was very, very strong. It included
4 WiFi. It included video, video compression. It included
5 things like wireless e-mails. It included maps. It included
6 ways to manage your applications. And all of these would be
7 discussed among the companies.

8 And Mr. Dailey will tell you that Motorola's practice in
9 doing that, in starting an opening offer, was that he would
10 come forward with 2.25 percent. That's usually where he
11 would start. And it was just, let's get things started.
12 And, in fact, you're going to see documents where he did just
13 that with this package.

14 And if we could very briefly go to Slide 16, Exhibit 7242.
15 And here you'll see this was a presentation to HTC where Mr.
16 Dailey said, we want a 2.25 percent rate. And it goes on at
17 the end there, you can see, "no royalty stacking?" Well,
18 that means something a little different than what the judge
19 told you guys. What it means is that, within Motorola, they
20 wouldn't add one SEP to another and increase the rate. So
21 like 2.25 percent was the maximum rate for the package. That
22 was the standard kind of offer. You get all of our
23 standards-essential patents on cellular, WiFi, and video
24 compression. And all of this for 2.25 percent. So that's
25 how he started in all these negotiations.

1 Now, another problem he had in trying to do this very
2 quickly -- oh, and by the way, this was well known. There
3 were actually articles written about the standard rate that
4 Motorola would come out with, and then would negotiate after
5 that.

6 So, when Microsoft says, come forward with your patents.
7 And there's a time pressure here, because, you know, when you
8 get that complaint, there's a summons with it that says
9 you've got to respond within 21 days. And there is usually,
10 again, postponements of that. But you were under time
11 pressure, and Microsoft is trying to prevent you from selling
12 your product in the United States. So there's some time
13 pressure here.

14 And so another problem he had was, well, what patents do I
15 put on the table? And in that regard we have so many patents
16 here -- oh, Ken is nice enough to put up one of these
17 articles that talks about the 2.25 percent as a published
18 rate that we had. And that is we have 10,000 patents. And
19 we want to get stuff together quickly. We know that we have
20 essentials on WiFi, video compression. We know that
21 Microsoft uses that. So those are easier to identify. So
22 you can kind of put those together quickly.

23 It's still a difficult thing to figure out what to do in
24 terms of a rate and stuff, because we had always licensed to
25 hardware companies, you know. And when you're talking about

1 Samsung and Ericsson and these other cellular companies,
2 we're trying to get freedom of action, it's hardware to
3 hardware. It's these phones, you know, or tablets, or
4 whatever. Microsoft was a little different. They had some
5 hardware, like the Xbox, but they had software. And Mr.
6 Dailey said he didn't exactly know what to do with that. He
7 knew there were going to be lots of discussions between him
8 and Mr. Gutierrez as to how to sort all of this stuff out.

9 So, he had all this in mind. And so what he does on
10 October 21st, you'll see, and you saw, a letter that was sent
11 out. The context of which was: We've sued you. We're
12 trying to put you out of business. Put your patents on the
13 table. And that letter -- and I'm putting up a graphic now
14 -- it's the October 21st letter regarding 802.11 patents.
15 And I've spread this out here because the attachment to the
16 letter are those patents. It's like 22 pages that show the
17 patents, so we can give that to Microsoft. And then there
18 was a cover letter there.

19 And if you look at the cover letter, it has the rate of
20 2.25 percent. And as I said, Motorola had never licensed to
21 a company like Microsoft before, and it had never licensed
22 the WiFi and the video compression separately. It always had
23 these packages that you'd go into the other companies for to
24 try to get freedom of action.

25 So, if you look at this, there are a couple things that

1 I'd like to point out to you. One is that -- you see, and
2 I'm going to try to see if my finger is any better than
3 Mr. Harrigan's here. It's not. Okay. It says, "Subject to
4 a grant-back license."

5 And what you're going to hear Mr. Dailey testify about is
6 that, you know, when you go into other companies, they have
7 SEPs, too. They can prevent you from practicing. Right?
8 Because they have standards-essential patents. And so one
9 thing that you want to make sure you're talking about is,
10 well, what do you have? And we thought that Microsoft had
11 some standards-essential patents as well. So that's going to
12 be part of the discussion. You've heard the discussion, this
13 is \$4 million. No, it's not. This is what Motorola would
14 come out and offer, this package, in quite a bit of ignorance
15 in this case, quite frankly, because it was a new area, and
16 it was a subpart of the package. And we know there's going
17 to be negotiation about, for example, grant-backs, expressed
18 right there.

19 Another thing, if we can go to -- I think this is Slide
20 15, -- and when it was blown out in Mr. Harrigan's
21 presentation you didn't see this, because this wasn't part of
22 the letter that was blown out. So you couldn't really read
23 it unless you had a telescope.

24 You see, it says, if Microsoft was only interested in
25 licensing some portion of the portfolio, they were willing to

1 enter into such a license, Motorola was, again, also on RAND
2 terms. And the reason for that is, we didn't know what --
3 how Microsoft used these patents. And that's pretty
4 important when you do license negotiations. What products do
5 you use them in? How important are they?

6 I mean, Microsoft, for example, later said that some of
7 our patents go to security in WiFi. That is, you know,
8 whether or not the signals are secure. And they said, well,
9 we have it in the standards, but we actually have a better
10 way of doing it. And you'd want to know that so you could
11 say, well, gosh, is what we're doing really that valuable?
12 Are our patents that valuable if you're actually doing
13 something else?

14 So he says, Mr. Dailey says, "Is there just some portion
15 of this that you need?" And the important part of this is
16 the context, the context, the much more. Mr. Dailey
17 expected, after this, that there would be negotiation, about
18 how significant these technologies are, how significant the
19 patents are. And you're going to hear, I believe, I'm pretty
20 confident in saying, at the end of the case, that opening
21 offers don't have to be RAND, that what you do is you
22 negotiate to try to arrive at RAND. Right?

23 And, in fact, that's what those policies say, those
24 standards-setting organizations policies, that's what they
25 say is, we expect you to negotiate. And I think Mr. Harrigan

1 put up one of them, I'm going to put up the same one. This
2 is Exhibit 1136. And you were shown the first paragraph of
3 this. But see here, "Negotiations are left to the parties
4 concerned and are performed outside the ITU-T," et cetera.
5 And that's the standards-setting organizations. What they
6 expect is for you guys to get together and talk. And, you
7 see, actually there's a little box there that says, "Also
8 mark here if the patent holder's willingness to license is
9 conditioned on reciprocity for the above document."

10 That's this grant-back idea, that you may have these
11 standards-essential patents that prevents me from selling my
12 phone, too. So, you know, I have to give you patents only if
13 you have to give me patents. And then we have to talk about
14 that. That's how the system works, so that somebody can't
15 hold up somebody else. And it just makes sense, you know,
16 from a business perspective. You want to make sure, after
17 these negotiations are done, that you can sell your product.
18 And they're not going to come back at you again and say,
19 ah-hah, we got this much money from you, but there is this
20 other patent that can prevent you from operating in the
21 marketplace.

22 Now, something else you should think about in this
23 respect, and that is, you heard this analogy about going to
24 get a Honda, and pay for it, and what if they ask a
25 ridiculous amount of money, you know? In this case, if you

1 look at that analogy, what happened here is Microsoft already
2 had the Honda. It had been driving around in it, had been
3 driving around in it for years. It had been using WiFi and
4 video compression in its products. It hadn't paid any
5 royalties.

6 And if Motorola wanted to be paid royalties, or if
7 Motorola wanted Microsoft to bring the Honda back, and give
8 it back to us, we had no power to do that except to go to a
9 judge, and a court, and say, "Is this reasonable?" We would
10 like to be paid royalties. Pay us reasonable royalties. We
11 would like them to stop driving our Honda. And they would
12 have to have a court decide whether or not that was
13 reasonable. It's nothing that Motorola had the power to do
14 by itself at all.

15 And while the threat of a lawsuit saying, pay me
16 reasonable royalties, you know, might have an effect on a
17 small, mom-and-pop organization that couldn't afford to fight
18 a lawsuit like that against Motorola, that's not a factor
19 when it comes to Microsoft. Motorola could get a rate it
20 asks for only if Microsoft agreed and accepted or if a court
21 said this is reasonable. There was no leverage there at all.

22 What really happened here -- and you might think the
23 language here is a little bit strange when I show you a
24 graphic, and I'll explain to you why I use this language.
25 What really happened after these letters were sent, after

1 these patents were put on the table at the request of
2 Microsoft, is the following: Here's what I'm going to prove
3 to you:

4 The October 21st letter has to be looked at in the context
5 of the realities of the dynamic of the engagement between the
6 two companies. I'm going to tell you what that means and why
7 I use those words in just a second.

8 Motorola did not signal that it wanted to handle these
9 patents as a separate track of negotiation apart from the
10 overall discussions. I mean, the idea here was to meet and
11 get all the patents on the table, and discuss a business
12 resolution, given the fact that Microsoft was trying to put
13 Motorola out of business. In fact, when this letter was
14 sent, remember there was an October 22nd meeting already
15 scheduled.

16 And then, finally, the parties expected and had broader
17 negotiations that encompassed but didn't focus on these
18 patents at all. This was sent in response to Microsoft's
19 request. When the parties got together to discuss the
20 resolution, these patents weren't discussed, these royalty
21 rates weren't discussed. What they discussed is, how do we
22 get peace? What are you asking for as a net? What are we
23 asking for as a net? Looking at all of our patents that we
24 have.

25 And the reason I'm confident that that's the reality, that

1 that's the context, that that's the realities of the dynamic
2 of the engagement, is that it's Mr. Gutierrez, I think, who
3 will tell you this. And, again, I think he will tell you
4 this because he's already sworn under oath on this topic.
5 And one way or another you will learn these facts.

6 So, the realities, the context, was this was a business
7 negotiation, where it wasn't Motorola exerting pressure, it
8 was Microsoft suing and saying, we have patents that can keep
9 you out.

10 As an example of kind of a litigation tactic, you were
11 shown that 20-day provision in the offer letter -- and this
12 is Slide 15, Ken -- "Motorola will leave this offer open for
13 20 days. Please confirm whether Microsoft accepts the
14 offer." And Microsoft contended this showed some sort of
15 hostility or something.

16 Well, what you're going to learn is, first, there was huge
17 time pressure here, because at this point there were two
18 lawsuits against Motorola, and we needed to get this thing
19 resolved as quickly as possible, or we faced being barred
20 from the United States for selling our phones.

21 The second thing is all this means is that you can't come
22 on day 21 and say, I accept. It means the offer is open for
23 20 days. And that had no significance whatsoever to
24 Microsoft because, again, I think you'll hear Mr. Gutierrez
25 testify that Microsoft virtually never says yes to that first

1 offer. I think it's less than one percent of the time where
2 Microsoft comes forward and says, yes, I'm going to pay that.

3 And Mr. Gutierrez, I think, will also tell you that under
4 this, his understanding is that Microsoft was absolutely free
5 to come back with a response saying, wait a minute, that's
6 ridiculous. I mean, let's look at how much it would cost for
7 us to do this. That's ridiculous. Let's look at how we use
8 your technology in our products. That's ridiculous. We
9 think it should be something like this. This doesn't prevent
10 them from doing that at all, Mr. Gutierrez will tell you
11 that.

12 And here's another thing you'll hear. Never, ever, ever
13 did Microsoft or Mr. Gutierrez say, we need more time. Can
14 you give us more time to respond? It didn't happen.

15 So what was Microsoft's response to this letter? Well,
16 they didn't say they were outraged. They didn't protest at
17 all. Not a peep. There was a meeting that day, the day they
18 received this, October 22nd. There was a meeting, 2010. It
19 was Mr. Dailey, Motorola's general counsel, Scott Offer -- an
20 ironic name, Mr. Offer -- and it was Mr. Gutierrez and his
21 boss, Brad Smith I believe is his name. I hope I got that
22 right, guys. And they met here. Motorola came out here.
23 And it was the friendliest meeting you would expect.
24 Mr. Gutierrez laughed and said, "We got your missive." And
25 then they sat down and they discussed how to get the freedom

1 of action, peace among the two parties.

2 Among the things that were said there is, Microsoft said,
3 we want you to continue to put your patents on the table. In
4 fact, Microsoft said, we realize in this context you may have
5 to sue us. That's what happens in these things. But we want
6 these discussions to continue.

7 And at one point Mr. Dailey said, why did you sue us? We
8 had this agreement to meet on October 22nd. And what they
9 said was, well, they approached another company, HTC, about
10 saying the Android system was owned partially by Microsoft,
11 and they were going to sue HTC, but they folded. And they
12 wanted some lawsuit that demonstrated to the world that they
13 were going to say, if you don't use Windows but you use
14 Android, you're still going to have to pay us. They wanted
15 some lawsuit that they could tell the world that was the
16 case.

17 And they wanted to time it with -- if we can go back to
18 the timeline again -- they wanted to time it with them
19 unveiling their new Windows Phone 7. That was the first time
20 they had the software that was the sensitive touch, you know,
21 as opposed to being the Blackberry-type of software. It was
22 when they, you know, Apple and Android -- well, Apple did
23 that years earlier, Android was doing it. This was
24 Microsoft's first attempt at it. They wanted to time that.
25 In fact, they said, what we want to do is get this resolved

1 as quickly as possible so our two CEOs can be up there on the
2 stage shaking hands and getting that publicity about
3 Microsoft owning part of Android.

4 So at the end of that they shook hands, no one said a
5 thing about an outrageous offer. They said they were going
6 to schedule future meetings. Motorola said, you've got to
7 give us a few weeks, because we've got a lot of patents, and
8 you want us to put all our patents on the table. A few weeks
9 later Motorola sent the other letter, which was basically
10 just like the one of October 21st. It was October 29th.
11 They were looking into one of their patents.

12 And what happens is -- if we can go back to the
13 timeline -- is they sue us. Oh, I'm sorry, I'm going to skip
14 this. That's why I have a timeline, so I don't forget what
15 to say.

16 On November 8, 2010, Microsoft's Windows Phone 7 is in the
17 stores. It's finally there. You can go and get it. Then
18 what happens? Again, without a phone call or an e-mail or a
19 howdy-do, on November 9th Microsoft sues, for the third time,
20 sues Motorola. Context to context. Now saying, oh, those
21 two offers you sent us, they're outrageous, they're not RAND,
22 you breached your contract, you owe us money.

23 At that point what Motorola did was not surprising at all.
24 Now, look, Microsoft will tell you, I think Mr. Dailey will
25 tell you in this situation, it's common for people to put

1 patents on the table, that they sue each other. Microsoft
2 said, you might want to do that in the October 22nd meeting.
3 So after we were sued for the third time, then Motorola filed
4 three lawsuits. But they were kind of to mirror the
5 Microsoft lawsuits.

6 On November 10 we filed a lawsuit in Wisconsin which had
7 SEP patents and non-SEP standards-essential patents. We
8 filed a suit in the Southern District of Florida, which had
9 more non-SEP patents. They weren't standards-essential. So
10 we're talking like the wireless e-mail patents that Motorola
11 had, or the application syncing, some voice-recognition
12 patents as well.

13 And then a little bit later we sued in the ITC on both
14 standards-essential patents and patents that weren't
15 standards-essential. So, basically, everything was put on
16 the table now. The patent portfolios of the two companies.
17 And what later happened is that some of these were
18 transferred here to Seattle. Because sometimes that's what
19 happens. Motorola might want to be in Florida where its
20 company is that does pagers, and Microsoft might want to be
21 in Seattle, for obvious reasons. And there's a decision that
22 for efficiency it should be done in the same place.

23 You were told in the lawsuit Microsoft filed there was
24 suggestion they were willing to pay a RAND rate on these
25 patents. Do you recall that? Well, actually, that's not

1 what that lawsuit says. It does ask for a determination of,
2 what would RAND be. Let's have the court determine. But
3 what the response was to Motorola's lawsuits, actually suing
4 on these patents, was Microsoft said, we don't use this
5 technology. We do not infringe. We don't owe you a penny.
6 And, indeed, their defenses included, you waited too long to
7 sue. And, your patents aren't valid. You can't assert your
8 patents against anybody in the world. And that, obviously,
9 is, again, a huge threat to Motorola, saying our patents
10 aren't valid. And this was the vortex. This is what
11 Motorola got sucked into because of this goal of asserting
12 leverage on Android.

13 And I mentioned that there was a presentation to the FTC
14 by Microsoft months later. So to show you that this is a
15 litigation tactic, after we filed our suit in Wisconsin, and
16 one of the things we asked for was an injunction. And you're
17 going to hear testimony, there isn't a patent lawsuit around
18 where you file where you don't ask for damages and an
19 injunction, if the court thinks that is reasonable and
20 appropriate. It's not something we can decide.

21 After we filed those lawsuits, after we filed the suit in
22 the ITC, Microsoft sends a letter to the Federal Trade
23 Commission. Its purpose is to say, you don't have to worry
24 about patent hold-up in the world. It's not a real problem.

25 Here is what they said with respect to their own

1 experience. It's June 14, 2011, this is page 7. Microsoft
2 says to this government agency, "In the former context there
3 seems to be a dearth of examples of actual patent hold-up
4 with regard to the essential patent claims reading on a
5 standard." You were told what Microsoft was saying was
6 generally that's not a problem, but there are some bad actors
7 like Motorola. I don't know if you recall that.

8 Here's what they said to the federal government in June of
9 2011. "Microsoft has never been accused of patent hold-up in
10 this regard, nor has it accused any other company of such
11 behavior." It goes on to say, "This is not to say that
12 Microsoft has never been a party to litigation where the
13 parties disagree whether preferred licensing terms were
14 consistent with the relevant patent licensing commitment,
15 such as RAND. When companies have such bilateral
16 disagreements, it may make sense for them to seek resolution
17 in the courts. But such litigation is rarely limited to the
18 proposed licensing terms for just the essential claims
19 reading on a standard. Typically such litigation is
20 addressing other patent-related issues, or even other
21 business terms that the parties have been unable to reach
22 agreement on."

23 And all of that is true here. They're right. There
24 wasn't any patent hold-up. What we had here was a broader
25 discussion between the companies -- on other patents and

1 other business issues -- that were important to both
2 companies.

3 So that having been said about how we were drawn into
4 this, and how this was basically a dispute between the
5 company that was much larger, and is only being described as
6 patent hold-up now, so Motorola has to fund attorneys fees
7 and their move from Germany.

8 Let me go to the next part of the story. I'm going to put
9 up a timeline now, if I can, about what happened in Germany.
10 And Motorola filed a patent suit against Microsoft in Germany
11 in July, 2011. It says two days there because, in Germany,
12 you can only file one patent per suit, so it took actually
13 two days to file those lawsuits. As of that time the parties
14 had been having discussions for months. Microsoft had never
15 said that they were going to pay RAND. Microsoft took the
16 position, your patents are worthless, they aren't valid, we
17 aren't even infringing. Now, this lawsuit was a breach of
18 contract lawsuit, so Microsoft filed that here in the United
19 States.

20 For patent lawsuits you have to go where the patent is.
21 That is, we have patents, Motorola and Microsoft, in the U.S.
22 But if you want to enforce patents in Germany, you've got to
23 go to Germany where there are German patents and actually,
24 sometimes, different rules of law.

25 Now, we're not going to ask an American court to try to

1 determine whether a German patent is valid. So, companies,
2 Microsoft, Samsung, Apple, they file in other countries to
3 enforce their patents in those countries.

4 Why Germany? Well, Microsoft suggests the reason they do
5 it in Germany is they have this big distribution center.
6 Well, here's what's going to be undisputed, and that is
7 72 percent -- I'm sorry, two-thirds, I got that wrong
8 again -- two-thirds of all patent suits filed in Europe are
9 filed in Germany.

10 Now, both sides here have German law experts to kind of
11 explain to you what the law is. And they agree on a
12 surprising number of things. There's a Professor Haedicke
13 and a Professor Bodewig. I think they're both here today.
14 And one thing they'll agree on is that the German courts have
15 a reputation for being the best, most efficient, most
16 technologically savvy courts in Europe. Mr. Bodewig, who is
17 Microsoft's expert, said people file in Germany because the
18 courts have a particular expertise. It is efficient, a lot
19 cheaper than in the UK. I don't know if any of you have
20 traveled in the UK lately, you might understand that. And
21 that it's quick. It's very quick. So that's Germany.

22 Now, it is not a breach of a RAND obligation to seek an
23 injunction when someone is not willing to pay you anything,
24 saying your patents aren't valid, saying they don't infringe.
25 The RAND obligation does not prevent you from seeking an

1 injunction. You have to look at particular cases. There may
2 be somewhere it would, but not in these circumstances, when
3 you look at the facts. And, in fact, remember, as of this
4 time Microsoft never said it was willing to pay or had said,
5 we do, in fact, infringe your patents; and, yes, they're
6 valid.

7 When Microsoft made its presentation to the FTC in June of
8 2011, it told the FTC what Microsoft's view was on
9 injunctions under the RAND circumstances. And so what
10 Microsoft said to the government at that time is that same
11 document. They say, "In addition, the existence of a RAND
12 commitment to offer patent licenses should not preclude a
13 patent holder from seeking preliminary injunctive relief or
14 commencing an action in the International Trade Commission,
15 just because the patent holder has made a licensing
16 commitment to offer RAND-based licenses in connection with
17 such a standard."

18 They go on to say, "Whether such relief is available
19 should be assessed under the current legal framework in the
20 applicable jurisdiction, which often is premised
21 substantially on the specific facts and circumstances at
22 issue ." Now, pay attention to the last line here. "Any
23 uniform declaration that such relief would not be available
24 if the patent holder has made a commitment to offer a RAND
25 license for its essential patent claims in connection with

1 the standard, may reduce any incentives that implementers
2 might have to engage in good-faith negotiations with the
3 patent holder." Now, in this case Microsoft is the
4 implementer, because they're the ones using the patent.

5 And the reason that you can still try to get injunctive
6 relief is sometimes those people using their patents won't
7 come forward and say, okay, okay, we'll pay you something,
8 unless you seek this kind of relief. And that, by the way,
9 is what happened here. Microsoft didn't come forward and say
10 we'll pay your RAND rate until after this lawsuit was filed
11 in Germany. So, that's concerning the filing of the lawsuit.

12 Now, let me talk to you about, Microsoft is coming here
13 and saying, we moved because of this. We moved because you
14 filed in Germany.

15 Well, to be clear, there was never an injunction in
16 Germany. If Microsoft had not moved they'd still be selling
17 whatever they wanted to sell in Germany and elsewhere. And
18 also to be clear, you don't get an injunction in Germany
19 unless there's a finding that you use and infringe the
20 patents, that you're actually using the technology.

21 But here's what the evidence will show, and this is kind
22 of in the timeline you already saw, is Microsoft files the
23 infringement suit -- Motorola files it in Germany July 6, 7.
24 Microsoft said that made us move because we knew there would
25 be injunctive relief. It was six months before Microsoft

1 said it even considered moving out of Germany. It was
2 eight months after filing that lawsuit before they say they
3 decided to move out of Germany.

4 And only after deciding to move, if you look at the
5 March 20th, only after deciding to move did they go to the
6 court here and say, hey, could you tell us that we don't have
7 to move? They didn't ask this court previously, before they
8 decided to move, whether or not they actually had to.

9 If Microsoft feared an injunction -- by the way, the
10 evidence is going to show that if a fear of injunction is why
11 they moved, they would have moved despite this lawsuit, our
12 lawsuit, about standards-essential patents. And here's why.
13 For one thing, the lawsuit we filed also had
14 non-standards-essential patents. There's no breach of
15 contract with any of these standard-setting organizations, or
16 with Microsoft, by seeking an injunction against these
17 non-standards-essential patents. Just as Microsoft sued
18 against Motorola on the Android stuff. It's not a breach of
19 contract.

20 And at the time that Microsoft says it decided to move,
21 that was over their heads, too, that there would be an
22 injunction on these non-standards-essential patents. So if
23 that's why they were going to move, they were going to move
24 anyway.

25 The second thing you're going to hear is that Microsoft's

1 in-house counsel, and you're going to hear from one of them,
2 Sheila -- I think McKinley is her name, and I hope I didn't
3 get that wrong, but if I did I apologize, I'm terrible at
4 names -- but she testified that the legal staff realized,
5 wait a minute, we have our distribution center in Germany,
6 two-thirds of all patent suits in Europe are filed here. The
7 German courts issue injunctions a lot.

8 So she'll tell you that for the future, for other
9 lawsuits, for an Apple suing, or a Samsung, or whatever, that
10 they should get out of Germany. That was a bad place to have
11 their distribution center because of the legal scheme there.
12 And because it was such a popular place to be. So she
13 advised the business people of that. Which is, you know, for
14 the future, you've got to get out of here. It's not just
15 because Motorola filed a lawsuit here; it was because they
16 realized they were in the wrong place, and they should move
17 their distribution facility somewhere else, like, say, the
18 Netherlands, which is what they did.

19 Now, another thing; this move benefited them. Now, the
20 move -- I think the distance, if we can put up 32 -- the
21 distance was about 75 miles from Germany to the new facility
22 in the Netherlands. I guess about from Microsoft's campus
23 here, to Olympia, about, you know, a little more, maybe three
24 or four miles more.

25 And Ms. Teresa Daly was working on this move. She was a

1 general manager. She's based in Ireland. And she sent an
2 e-mail describing the benefits of this move. And this is in
3 an unreadable form, so we'll pull it out. This is on
4 June 12, 2012. And she said, "The decision to move our main
5 distribution center in Europe was made with a vision for the
6 future. To support the growth in our business over the years
7 ahead, we need to significantly scale our distribution
8 footprint and capabilities in EMEA." And this is this whole
9 area where Microsoft was distributing. And she talks about
10 the transition not being easy.

11 And there's, attached to the bottom of this, some
12 statistics. And we're going to make this a little bit
13 readable for you. And she talks about how much bigger the
14 new facility is, how much more storage space, how many more
15 production lanes and loading bays. And let's put up 36.

16 And when you look at those figures, they're increasing
17 their footprint, which they said was needed for the future,
18 by like 91 percent, their storage space by 90 percent, they
19 were doubling their production lanes. They were increasing
20 their loading bay doors by 171 percent. So, there are
21 benefits to this move, apart from just getting out of Germany
22 because of the legal system.

23 So you're going to be told by witnesses of Microsoft, we
24 moved because of the Motorola lawsuit, and that alone. And
25 you're going to have to evaluate that testimony. Now, let me

1 give you an example of what I think you're going to hear.
2 Now, you're going to hear from Mr. Davidson, who is a general
3 manager of the supply chain. He is going to testify, for
4 Microsoft, the reason we moved is because of this possibility
5 of an injunction. So, I predict that when we show him that
6 e-mail -- I predict, because I've taken his deposition, and
7 he was sworn under oath -- that this particular e-mail, if we
8 can go back to it from Ms. Daly, he said, I never reviewed
9 it, and those numbers are wrong anyway.

10 Well, we took Ms. Daly's deposition. She's the person who
11 sent this. I predict that what she will say is that not only
12 did Mr. Davidson review this, he supplied the numbers for the
13 e-mail. We should not pay for Microsoft's move.

14 THE COURT: You have ten minutes left.

15 MR. PRICE: Almost ahead of myself here. You'll be
16 glad to hear that.

17 I want to talk about one more area, that is you were --
18 there was discussion about this company, Marvell. And what
19 we will prove to you during this trial, that again is a
20 litigation tactic by Microsoft to apply pressure to Motorola.
21 Because here is what happened. Marvell is a supplier of
22 Microsoft, a huge supplier to Microsoft. So, when these
23 lawsuits were filed, Microsoft contacts Marvell. Marvell has
24 been selling their chips for years. Motorola has never gone
25 to Marvell and said, you know, we demand you stop, we're

1 going to exercise leverage and make you pay a lot. Motorola
2 has never done that to anybody on these technologies.

3 But they went to Marvell, and you're going to see an
4 e-mail from Ms. Ochs, Jennifer Ochs, who was at Marvell. She
5 sends it to Timothy Kowalski, who you'll hear from, from
6 Motorola. She says, Marvell is prompted to make this request
7 for a license in response to Microsoft's assertion that
8 Marvell is contractually obligated to obtain such a license
9 to cover the chips Marvell supplies to Microsoft for its Xbox
10 console and wireless internet adapter. Then she asks for a
11 price. This was leverage. This was bending somebody's arm
12 to ask them to do something they did not want to do. Why?
13 To set up this lawsuit.

14 And you're going to hear what happened, actually, is kind
15 of what should happen. And that is, Motorola sent the
16 standard letter, okay, 2.25 percent. Let's talk. And what
17 Marvell did back is they said, you know, let's talk about
18 this. We have standards-essential patents, too. So we
19 should cross-license and come to a business resolution of
20 this. And then we did what you're going to hear is the
21 custom and practice, the way this usually works out if you're
22 not rushed because you're already sued, and that is, we said,
23 well, can you provide us something called claim charts.

24 And what claim charts are is where, you know, I say I have
25 a patent and what you're doing infringes it. Well, the

1 patent says, A, B, C, D is what you need to do to infringe my
2 patent. So I give you a chart that says, my patent says A,
3 B, C, D, and here's your product. And it does A, B, C, D.
4 And you chart that out. So we said, why don't you give us
5 that. And, in fact, let's look at 42. This is going to be
6 Exhibit 3404. This is Mr. Kowalski talking to Ms. Ochs. And
7 toward the end there it says, "I requested that Marvell
8 provide to Motorola Mobility, and Marvell agreed to provide,
9 claim charts demonstrating the purported relevance of
10 Marvell's patents to the 802.11 standard. Please provide
11 Motorola Mobility with the requested claim charts so that we
12 can understand Marvell's assertion regarding the essentiality
13 of its patents and evaluate Marvell's proposal." That's the
14 way it works in a good-faith negotiation. You don't say,
15 give us more patents, tell us about more patents, and then
16 sue. You engage in these negotiations.

17 And what happened here is that the response -- this was
18 from Ms. Ochs -- was, "Thank you for the update, and all the
19 best to you and your new position at Google." Because Google
20 took over Motorola. Most of this time Motorola is out there
21 by itself. But Google bought Motorola at some point in 2012.
22 And they say, "We will work on providing the supporting claim
23 charts."

24 Now, Marvell was so into this, so incentivized to ask for
25 this license, that they didn't do that, that they didn't

1 provide the charts. They just let it drop. Because the
2 evidence is going to show they didn't really want to engage
3 in negotiations either; they were being forced to do this by
4 Microsoft for this litigation. Litigation tactics.

5 What I am going to show you during this trial is Motorola
6 acted in utmost good faith, continued after these lawsuits,
7 actually. Mr. Dailey and Mr. Gutierrez continued to try to
8 reach some business resolutions and weren't able to. But the
9 reason we're here, and the reason this leverage is still
10 being applied at this late date, is it has nothing to do with
11 those two letters or the lawsuit in Germany; it has
12 everything to do with the overall marketplace for phones and
13 what role people are going to have.

14 So thank you. And I hope you enjoy the trial.

15 THE COURT: Thank you, Mr. Price. We have about ten
16 minutes before I'm going to release you for the day. I'm
17 going to give you five minutes off, because I'll take five
18 minutes and read you something that you will know by heart by
19 the time we finish, then I'll talk a little bit about what
20 will happen tomorrow.

21 We are about to take our first recess. Remember that,
22 until the trial is over, do not discuss this case with
23 anyone, including your fellow jurors, members of your family,
24 people involved in the trial, or anyone else. And do not
25 allow others to discuss the case with you. This includes

1 discussing the case in internet chat rooms, or through
2 internet blogs, internet bulletin boards, e-mails or text
3 messaging.

4 If anyone tries to communicate with you about the case,
5 please let me know about it immediately. Do not read, watch,
6 or listen to any news reports or other accounts about the
7 trial or anyone associated with it, including any online
8 information.

9 Do not do any research, such as consulting dictionaries,
10 searching the internet, or using other reference materials,
11 and do not make any investigation about the case on your own.

12 Finally, keep an open mind until all the evidence has been
13 presented and you have heard the arguments of counsel, my
14 instructions on the law, and the views of your fellow jurors.
15 If at any time you need to speak with me about anything,
16 simply give a signed note to the clerk, who will give it to
17 me.

18 I'm sure you're all familiar with those by now, having
19 heard them two or three times. Let me talk a little bit
20 about them. The internet has changed a lot of things, one of
21 which is the court system. It's changed it in a couple of
22 ways. One way is it's made online research very simple. I'm
23 going to say something that will shock you. Not everything
24 you read on the internet is accurate. That's what we're
25 trying to shield you from, the person who has something out

1 there that's just nutty. You read it. You don't have the
2 context. You don't have the background to know if it's
3 accurate or not. And now you know it because you read it on
4 the internet.

5 This has been frighteningly demonstrated in a number of
6 cases, and it's something we spend a lot of time worrying
7 about and warning you about.

8 Secondly, this is a wonderful form of communication,
9 particularly people who have Facebook accounts, or whatever.
10 They have social chat rooms, they go online and say, boy, I'm
11 having this great experience, and you should know how
12 interesting this case is. And I'm so impressed with this and
13 not at all impressed with that. That's absolutely contrary
14 to everything. But somehow we don't have that linkage that
15 this is what I'm doing, and this is what the judge said, and,
16 you know, I'm not supposed to be doing that. So I'll remind
17 you of that regularly.

18 And then, finally, there's some really interesting work
19 being done on how to do jury deliberations. It's funny that
20 we say to you, don't talk to each other until the case is
21 over with. What we're trying to prevent is you hearing one
22 set of witnesses, Microsoft is going to go first, and hearing
23 that, and talk, and start to form those opinions. And
24 Motorola hasn't had a chance to present any evidence yet. So
25 there's a lot of discussion of what's the best way to do it.

1 But for the time being the rule is I'm going to ask you not
2 to discuss the case among yourselves until you've heard all
3 of the evidence.

4 And don't forget those very important instructions of law
5 that I'm going to read to you at the end of the case. So
6 it's not that we're trying to hide stuff from you. It's not
7 that we're not trying to ask you to be well-informed. We
8 hope everything that you'll need to decide the case will
9 occur here in the courtroom. After it's gone through, as you
10 can see, it's obviously a very full vetting process.

11 For those of you who don't work downtown, it's August
12 still, so snowstorms are probably not likely. Earthquakes,
13 floods, traffic accidents, kind of you-name-it, still
14 happens. However long you think that it will take you to get
15 downtown, roughly double it, and you'll be fairly accurate.
16 It really is embarrassing when you have to call at 8:55 and
17 tell the clerk that you're at Northgate, but the traffic is
18 really slow, and the bus will get there sooner or later.

19 For those people who don't work downtown, Seattle does
20 have a traffic problem, and sometimes it's an issue for us.
21 And if you come early, you can make coffee back there and
22 entertain yourself, meet your fellow jurors, just not talking
23 about the case.

24 Other than that, we got through a lot of material today.
25 I thought the lawyers were very efficient in the use of their

1 time. That's what our goal is. We know this is an
2 inconvenience for you. When you're here, we're going to have
3 you working. You may come by and see us in here early in the
4 morning, over the lunch hour sometimes, or staying after.
5 We're doing things that have to do with organizing the next
6 day. There is a reason we didn't invite you to attend. It's
7 usually because we're talking about something that will
8 happen in front of you, and what fun would that be if you
9 already knew what the result was going to be?

10 So, with those cautions -- if I'm doing something else,
11 I'll usually try and tell you, and you're welcome to come in
12 and watch. I need to do a criminal sentencing sometimes
13 outside of hours, since we're having the trial during the
14 day. And that usually will cause you to not want to spend
15 any more time in the courthouse than you have to.

16 So, with those admonitions, thank you for your attention
17 today. The parties appreciate it, and so do I. We'll see
18 you all, if you could be here at 8:50 or so in the morning.
19 We start at nine, go to 10:30, take a break for 15 minutes,
20 go to noon. We take an hour and a half lunch hour, go to
21 3:00, take a 15-minute break, then a hard stop at 4:30.
22 That's our day tomorrow. Microsoft will be calling their
23 first witness, and we'll get the trial underway.

24 (The following occurred outside the presence of the jury.)

25 THE COURT: Mr. Harrigan, any matters we need to take

1 up?

2 MR. HARRIGAN: I don't know of any, Your Honor.

3 THE COURT: All right. Mr. Price?

4 MR. PRICE: None, Your Honor.

5 THE COURT: All right. Counsel, timing today, if you
6 tell me you're going to take an hour for opening statement,
7 you need to take an hour, because it's my hard rule that we
8 fit both of them in on the same day. So, Mr. Harrigan,
9 that's why I prompted you to move along.

10 MR. HARRIGAN: I wasn't keeping very good track
11 myself.

12 THE COURT: All right. We'll see you all tomorrow.
13 Other than that, we'll be in recess. Good night.

14 (The proceedings recessed.)

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C E R T I F I C A T E

We, Barry Fanning and Debbie Zurn, Official Court Reporters for the United States District Court, Western District of Washington, certify that the foregoing is a true and correct transcript from the record of proceedings in the above-entitled matter.

DATED this ^ day of August, 2013.

/s/ Barry Fanning

/s/ Debbie Zurn

Barry Fanning, Court Reporter

Debbie Zurn, Court Reporter